EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PROCEEDINGS AND ORDERS DATE: 10?

CASE NBR 85-1-06956 CFH
SHORT TITLE Aldrich, Levis L. DOCKETED: May 27 198
VERSUS Wainwright, Sec., FL DOC

Date	Proceedings and Orders
Mar 13 1986	Application for extension of time to file petition and order granting same until May 26, 1986 (Powell, March 15, 1986).
May 27 1986	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jun 18 1986	Brief of respondent Wainwright, Sec., FL DOC in opposition filed.
Jun 25 1986	DISTRIBUTED. September 29, 1986
Sep 12 1986	Supplemental brief of petitioner Levis L. Aldrich filed.
Oct 3 1986	REDISTRIBUTED. October 10, 1986
Oct 14 1986	REDISTRIBUTED. October 17, 1986
Oct 20 1986	The petition for a writ of certiorari is denied Dissenting opinion by Justice Marshall with whom Justi Brennan joins. (Detached opinion.)

****

No. 85-6956

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

==========

LEVIS LEON ALDRICH,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

==========

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

RICHARD H. BURR III
Assistant Public Defender

Counsel for Petitioner

43pp

QUESTIONS PRESENTED

1. When a criminal defense lawyer is found to have performed deficiently under the first prong of Strickland v. Washington by gross neglect of his duty to investigate and prepare for trial, can the "prejudice" required under the second prong of Strickland be established on the basis of his failure to impeach crucial prosecution witnesses in a closely balanced case, or must the defendant show "prejudice" by producing after-discovered evidence affirmatively supporting his innocence?

2. Did the Court of Appeals below misconstrue the prejudice requirement of Strickland by holding, in a capital case where it found that defense counsel's "failure to take depositions and to investigate" fell below minimum constitutional standards for attorney competence:

(A) that prejudice under Strickland could not be shown solely through defense counsel's failure to discover and present facts impeaching the credibility of a prosecution witness "who furnished the only direct evidence that [the defendant] ... committed murder," and through counsel's failure to conduct an adequately prepared cross-examination of this witness and another who provided "[s]ome of the most damaging testimony" against the defendant in an otherwise weak prosecutive case, but rather

(B) that prejudice could only be shown by producing "evidence ... in ... post-conviction proceedings ... that could have been discovered and presented at trial ... that would have clearly corroborated [the defendant's] ... alibi or supported [his lawyer's] ... speculation" that other persons had committed the capital offense?

3. Did Florida's pre-Lockett application of its capital sentencing statute to preclude all nonstatutory mitigating circumstances violate the Eighth and Fourteenth Amendments in this case by excluding the only mitigating feature of record in this case -- residual doubt about guilt -- from the sentencing determination?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

==========

LEVIS LEON ALDRICH,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, LEVIS LEON ALDRICH, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed August 28, 1985, and states:

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 777 F.2d 630 (11th Cir. 1985), and is set out at pages 1a-15a of the Appendix.[1] The summary orders denying rehearing and rehearing en banc are unreported and are set out at App. 16a, 17a. Tne Orders of the United States District Court, Southern District of Florida, dismissing the petition for writ of habeas corpus, dated December 2, 1983 and June 8, 1984 are unreported, and are set out in the Appendix at pages 18a-24a and 25a-27a respectively.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on November 19, 1985, and petitioner's timely petition for rehearing was denied on December 27, 1985. Thereafter, Justice Powell entered an order extending the time within which to file

[1] Citations to the Appendix accompanying this petition are designated App. ___.

the petition for writ of certiorari to and including May 26, 1986. That date was "a federal legal holiday" and "the next day [which was not] a federal legal holiday" was May 27, 1986. Rule 29.1, Rules of the Supreme Court of the United States. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defence;

and the Fourteenth Amendment to the Constitution, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

A. Course of Prior Proceedings

On January 8, 1975, Mr. Aldrich was convicted of first degree murder and sentenced to death in the Circuit Court for the Nineteenth Judicial Circuit of Florida. R 82, 84.[2] The Florida Supreme Court affirmed the judgment and sentence, and certiorari was denied. Aldridge v. State, 351 So.2d 941 (Fla. 1977), cert. denied, 439 U.S. 972 (1978).

Thereafter, post-conviction relief was sought in the state trial court, and the denial of relief after an evidentiary hearing was affirmed. Aldridge v. State, 425 So.2d 1132 (Fla.),

[2] The following symbols will be used herein to denote references to the various portions of the record that were before the Court of Appeals below:

RA -- The Record on Appeal (Volumes 1-7);

R -- Record on appeal in the Florida Supreme Court on direct appeal;

T -- Transcript of the state trial and sentencing;

RH -- Record on appeal to the Florida Supreme Court from the denial of post-conviction relief; and

TH -- Transcript of the state post-conviction hearing.

cert. denied, 461 U.S. 939 (1983). An original petition for writ of habeas corpus was also filed in the Florida Supreme Court and denied. Aldridge v. Wainwright, 433 So.2d 988 (Fla. 1983).

Mr. Aldrich filed his federal habeas corpus petition in the United States District Court for the Southern District of Florida on June 15, 1983. RA 1-376.[3] On December 2, 1983, the district court denied the petition as to all but one issue, RA 596-602, and on June 4, 1984, entered a final order denying the petition and issuing a certificate of probable cause. RA 1803-05. On November 19, 1985, a divided panel of the court of appeals affirmed the district court's order. Aldrich v. Wainwright, 777 F.2d 630 (11th Cir. 1985).

B. Material Facts

Levis Aldrich was charged with murdering Robert Ward during the course of a robbery in Ft. Pierce, Florida on September 3, 1974. The robbery apparently occurred as Mr. Ward, the manager of Al DiVagno's restaurant, was locking up for the evening. Mr. Ward called his wife at 12:05 a.m. to indicate to her that he was about to leave. T 219-20. Thereafter, at 12:14 a.m. the police received a signal from the restaurant's burglar alarm, T 223, and upon their arrival at 12:19, they found Mr. Ward's body beside his automobile at the side of the restaurant. The burglar alarm had been activated by the opening of an office door inside the restaurant where the safe was located. T 267-68. The owner estimated that between $600 and $900 was taken in the robbery. T 307-09.

The state's case was wholly circumstantial. The owner of the restaurant, Al DiVagno, testified that Mr. Aldrich had worked for him for about three months in 1974, but that he had fired Mr. Aldrich in July or August for trying to "boss" the other kitchen employees. T 315-17. During the period of his employment, he knew that Mr. Aldrich had become familiar with the closing

[3] Jurisdiction of the federal court was invoked pursuant to 28 U.S.C. § 2241 and § 2254, the petitioner being held in the custody of the State of Florida, and petitioner alleging that such custody was in violation of the Constitution of the United States.

procedures and the burglar alarm system at the restaurant. T 315-16. A restaurant employee testified that Mr. Aldrich had told her that he planned to "hit" the restaurant after he was released on parole. T 504.[4] A person confined with Mr. Aldrich at the Community Correctional Facility, Norman Sapp, also testified that Mr. Aldrich planned to "hold up" the restaurant after he was paroled. T 334. Two young girls testified that on the night of the robbery and homicide, they were with a man named Charles Strickland when he gave the murder weapon (a shotgun) to a man he referred to as "Levi" in the parking lot of a Ft. Pierce hotel. T 392-97, 401-05. They could not identify "Levi" as Mr. Aldrich, but one of them identified a photograph of Mr. Aldrich's car as the car into which "Levi" put the gun. T 392-95, 401-02.

According to the prosecution's evidence, two other events occurring after the robbery and homicide tended to tie Mr. Aldrich to the crime. At 1:00 a.m. on September 3, a security guard saw a car like Mr. Aldrich's car leave the vicinity of a warehouse where the shotgun was supposedly hidden following the crime. T 280-85. Thereafter, at 2:00 a.m. Mr. Aldrich drove slowly past Al DiVagno's restaurant. Because this seemed suspicious to the police officers who were still at the restaurant, an officer stopped Mr. Aldrich. T 292-97. The officer found that Mr. Aldrich had several hundred dollars in cash "stuffed" in his pockets and wallet. T 295, 303, 305. Mr. Aldrich explained that he had received the bulk of the cash upon being paroled a few days earlier and invited the police officers to his hotel room where he showed them a Department of Corrections receipt, as well as pay stubs from the FMC Corporaton (where Mr. Aldrich was then employed), which confirmed his explanation. T 299-300.

The only other evidence presented by the state -- the testimony of Charles Strickland -- was quite clearly the most important evidence, for he pieced together the state's other circumstantial evidence. Strickland testified that he knew Mr. Aldrich because they had both been inmates at the Ft. Pierce

[4] At the time, Mr. Aldrich was in a work release program at the Community Correctional Facility in Ft. Pierce. T 421-22.

Community Correctional Facility. T 342-43. By September 2, 1974, however, both were on parole. T 345-46. On that date, he agreed to loan Mr. Aldrich his shotgun, which he owned in violation of the terms of his parole. Id. He said that he transferred the gun to Mr. Aldrich at 7:30 p.m. in the parking lot of the Ft. Pierce Hotel. Id. Later that night, according to Strickland, Mr. Aldrich called and told him that he had killed someone with the gun. T 352. The next day Mr. Aldrich asked Strickland to accompany him to retrieve the gun from the warehouse area where he had hidden it. Id.[5] He said that during the trip to the warehouse, Mr. Aldrich explained that he had robbed Al DiVagno's restaurant but that before he could leave, the restaurant employee who was still at the restaurant "grabbed for his mask and he had to shoot him ...." T 382. When Mr. Aldrich shot the man, the restaurant's door slammed, and "when the door slammed shut the [burglar] alarm went off." Id. After he and Mr. Aldrich retrieved the gun, Strickland disposed of it because he believed that his illegal possession of the gun would lead to being charged with the murder. T 357. He also admitted that when the state attorney first questioned him about the gun, he lied under oath as to what had happened to it. T 359, 371-72.

Mr. Aldrich's defense was that the state had failed to prove his guilt beyond reasonable doubt. In support of this position, counsel relied upon an alibi presented solely by Mr. Aldrich's testimony and upon the view that Charles Strickland's testimony was an incredible attempt to conceal his own role in the crime. See generally T 672-89.

Mr. Aldrich testified that on the night of the robbery and homicide he went fishing until 10:30 or 11:00 p.m., that he then went to a bar, and that he stayed at the bar until 1:30 or 2:00 a.m. T 516-18. Upon leaving the bar, he drove toward the home of a Mrs. Fish in order to finalize the rental of a room in her house. Even though it was late, Mrs. Fish had told him that she

---

5 This was the same warehouse area in which the security guard had seen a car similar to Mr. Aldrich's car at 1:00 a.m., shortly after the homicide.

often stayed up until 4:00 a.m. T 519. On the way he drove slowly by Al DiVagno's restaurant looking for the road which would take him to Mrs. Fish's house. T 519-20. At that point he was stopped by the police. He explained that he was carrying several hundred dollars in cash at the time because he had no bank account and was afraid to leave his money in the hotel room where he had been staying. T 520-21.

The defense presented no other witnesses. Defense counsel argued to the jury, however, that the evidence left too much doubt about Mr. Aldrich's guilt to convict him. Since Mr. Aldrich knew so much about the restaurant and would obviously be a prime suspect if it were robbed, counsel argued that it was illogical for Mr. Aldrich to consider robbing it -- and to connect himself to the robbery by driving by the restaurant after it had occurred. See T 677-78. He further argued that the crime scene evidence created doubt about Mr. Aldrich's participation in the crime, for Mr. Aldrich would have known that the burglar alarm had to be turned off before opening the door of the inside office in order not to alert the police to the robbery. T 679. He argued that even Charles Strickland's testimony concerning Mr. Aldrich's explanation of the circumstances of the homicide showed that Mr. Aldrich was not involved. Mr. Aldrich knew that the burglar alarm was silent and was activated by opening a door, yet Strickland testified that Mr. Aldrich told him the alarm had been set off (apparently audibly) by the slamming of a door. T 679-79. Finally, he argued that Mr. Strickland had lied in order to conceal his role in the crime and to direct the police away from himself. T 679-87. Strickland admittedly owned the murder weapon and gave it to the triggerman, and "[w]hoever got that gun from Strickland went out there and committed this crime ...." T 681-82.

C. Material Post-Conviction Evidence

A hearing was held in the state trial court limited to the claim of ineffective assistance of counsel. Defense counsel, Elton Schwarz, the elected public defender for the judicial circuit and his assistant Willie Gary testified. Bruce Wilkinson, who had originally been assigned Mr. Aldrich's case and who was familiar with the caseload situation at in the public defender's office at the time, also testified. An expert witness, appointed by order of the court, Gregory Scott, Esquire, provided expert opinion on the question of the effectiveness of counsel's representation as contrasted to prevailing professional norms at the time of the trial.

Mr. Aldrich was arrested on September 9, 1974 and at his initial appearance hearing the Office of the Public Defender was appointed to represent him. TH 241. Thereafter, the Public Defender, Elton Schwarz,[6] assigned assistant public defenders Wilkinson and Schopp to his case. By the date of arraignment, Mr. Aldrich brought to the court's attention that his case was not being prepared adequately. T 4. As counsel testified, "very little," TH 243, 248, investigation was done during this five week period. Assistant public defender Wilkinson was involved in "at least six other capital cases at various stages" including one capital trial in late September, TH 246-248, along with a "full complement of other felonies," TH 256. Investigation was limited hence, to trying to verify Mr. Aldrich's finances from the work release center, and to trying preliminarily to track down an alibi, by speaking with the clerk of the hotel where Mr. Aldrich lived and going to a bar. TH 243-244, RH 241-244. Though investigation was limited at this point, it

6 Mr. Schwarz is the elected Public Defender for the four-county 19th Judicial Circuit of Florida, and thus was responsible for providing representation to all indigent persons charged with a crime in the four counties.

turned out to be the only investigation of any substance that counsel was able to accomplish prior to trial.[7]

On October 31, 1974, Mr. Aldrich was again before the court and he again asked that someone other than the Public Defender's Office be appointed to represent him because he believed that the Public Defender had too many cases and insufficient time to devote to his case. T 6. The trial court told Mr. Aldrich that if he were dissatisfied with the lawyers assigned to him, he should talk to Mr. Schwarz, the Public Defender, and told him that he could not appoint another lawyer to represent him. T 7, 8. The next day the trial court brought Mr. Aldrich into chambers without counsel, and told him that he could not appoint another lawyer but that the Public Defender, Mr. Schwarz, would personally be present to represent him at trial -- "to sit in the trial with you." T 17. The Public Defender then met with Mr. Aldrich and told him "I guarantee you we don't let any case go to trial when we haven't adequately prepared because we can always ask for a continuance because we have not had time to prepare for it...." RH 211.[8]

7 The sum of the investigation at this point were three contacts made by an investigator. On September 16 the investigator spoke with Rosemary Grabhorn, the clerk at the hotel where Mr. Aldrich was living, to confirm that he stayed there. RH 243. He spoke with the record keeper at the community release center on the same day, confirming that Mr. Aldrich had $558 in his account when he was released. RH 243. On September 30, the investigator spoke with JoAnn Desmarais who said Mr. Aldrich was in her bar from 12:30-1:00 a.m. on the night of the offense and did not act unusual or nervous. RH 244. Someone also called the sheriff's office to ask for a picture of Mr. Aldrich. RH 251.

8 Mr. Schwarz's promise to Mr. Aldrich not to go to trial without preparation came during a lengthy and detailed interview with him on November 6, 1974. During that interview, Mr. Schwarz repeatedly reassured Mr. Aldrich in addition to that quoted in the text that the case would be investigated: that "two full time investigators can do that work on your behalf" RH 208; "if I handle a case I'm gonna handle it right and I'm gonna make sure its ready for trial before we go to trial," RH 213, and "I believe in exploring all the possibilities." RH 218.

Mr. Schwarz assigned the case to himself even though his schedule was "such that I would not want to undertake the responsibility of assuring that he receives a fair trial on my own." T 10-11; R 40-41; TH 164. Mr. Schwarz's office's workload was in the process of tripling. As Mr. Schwarz testified: "we had more capital cases at that time we've ever had since I've been in office, at any one given time." TH 168.[9]

The workload of Mr. Schwarz's office was such that in October, 1974, he would have moved to withdraw as counsel in this case, if there had been the legal authority that there is now under Escambia County v. Behr, 384 So.2d 147 (Fla. 1980) permitting a public defender's office to withdraw as counsel due to "excessive caseload" which would "compromise the effectiveness of representation." TH 180-81.

Due to this schedule and caseload, at the time Mr. Schwarz took over the representation of Mr. Aldrich, Mr. Schwarz informed the court that while he would be personally present at trial, he would be unable to assume responsibility for the preparation of the case for trial. R 40-41; TH 164. Thus, as Mr. Schwarz further informed the court, he had no option but to assign the preparation of the case for trial to Willie Gary, a legal intern in his office, who was "the only other personnel available for preparation of this case for trial." R 40. Mr. Gary was thus "in charge of the preparation of [Mr. Aldrich's] case for trial." R 31; TH 166.[10]

9 Mr. Schwarz also had other matters that demanded his personal attention including being "active at that time with the State Public Defender's Association on general legislative matters." TH 167. In fact during his initial interview with Mr. Aldrich on November 6 in which he assured him that the case would be prepared, Mr. Schwarz told Mr. Aldrich that "I've got to go to Tallahassee tomorrow ... and I'm gonna take a couple of weeks off...." RH 207. Also, one of the grounds put forth by counsel for a continuance was that he and his chief investigator were "scheduled to be in Key West [during the week of trial] for the purpose of attending the Mid-Winter Conference of the Florida Public Defender Association." R 32.

10 Mr. Gary had begun working part-time for the Public Defender in September, 1974 shortly after graduation from law school. After taking the Bar examination in October, he began working full time. On November 7, 1974 Mr. Gary was certified as a legal intern. He was licensed to practice law on December 20, 1974. TH 110-111. Mr. Gary was at that time thus "fairly inexperienced." TH 125.

Despite Mr. Schwarz's apparent delegation of responsibility for preparation of the case to Mr. Gary, Mr. Gary did not perceive himself as being in charge of anything since was only an intern. TH 112-13. He perceived his role as to assist Mr. Schwarz at the actual trial of the case. TH 113. Thus, Mr. Gary primarily was trying to get himself familiar with the case by reading the file. TH 14. Mr. Gary also had additional responsibilities during this time with an assigned caseload of misdemeanor and juvenile cases, TH 167, and being the "on call" lawyer for the office, TH 155. As he testified, the office was "a rat race." TH 154.

Mr. Gary did not really get involved in trying to prepare for trial until two or three weeks before it was scheduled for trial (January 6, 1975). TH 114-15. The only investigation Mr. Gary could recall was going to a bar once with an investigator to look for witnesses. TH 115-16.[11] Mr. Schwarz, consistent with what he had told the judge, was unable to prepare the case himself. He did not become involved in attempting to prepare the case until one or at most two weeks before trial. TH 166. Even then there was no active investigation undertaken.

Because of his lack of preparation, Mr. Schwarz moved for a continuance four days before the trial was scheduled to begin. RH 32-33. The motion for a continuance was filed in good faitn because counsel "just didn't have the time and at the last minute it slipped up on us ..." TH 120. Thus, counsel had just recently become actively involved in preparing the case and hence had just realized the amount of investigation and preparation that had to be done, TH 176: "I guess we just got caught sleeping, 'cause we kind of thought we'd automatically get the continuance with the magnitude of the case that we had, and [the caseload] in the Public Defender's Office...." TH 120-21. The

11 Mr. Gary was apparently referring to a contact made on December 12, 1974 by an investigator with JoAnn Desmarais in which she said that Mr. Aldrich came into the bar at 12:30 a.m. and stayed until 1:00 a.m. on the night of the homicide. RH 247. The investigator concluded that she "is a very accurate and positive witness [who would] make a good impression upon the jury." RH 248.

motion for continuance was heard on the day of trial, January 6, 1975. Mr. Schwarz flatly asserted: "This case is not prepared. We are not in a position to provide competent legal representation." T 26. He had never been required to go to trial in less than four months in a capital case. TH 72. Mr. Schwarz believed that since no previous continuances had been requested or granted, there would be no reason to deny the continuance. TH 177. Thus on the morning of trial both counsel believed that the continuance would be granted. TH 121-22. They had set up depositions of the state witnesses for the following week. The trial court did not find that the case had in fact been adequately prepared, but denied the continuance on the ground that: "There has been ample time for everybody to be fully prepared." T 26.

Mr. Schwarz testified unequivocally at the state post-conviction hearing that as a result of their lack of pre-trial preparation, he and Mr. Gary were totally unprepared for trial of Mr. Aldrich's case, TH 175, 239: "I don't ever recall going to trial even on a misdemeanor case in the state of readiness that we were in at that time," TH 179, noting that if he were forced again to go to trial in such a state of readiness, he would "stand mute." TH 239. As a result of counsel's inability to and failure to prepare for trial, virtually no investigation was undertaken and no discovery was conducted. The defense was unable to and failed to take any depositions. Of the forty-five persons listed by the prosecution in its seven witness lists (filed between November 8, 1974 and January 3, 1975), the defense deposed none -- although counsel had scheduled depositions for the week <u>after</u> the trial. Mr. Schwarz testified that depositions were essential to his representation of Mr. Aldrich, TH 173, as did Mr. Gary, TH 151, Mr. Wilkinson, TH 254, and the expert witness, TH 286.

Though the state, pursuant to discovery rules, provided statements it had taken from seven of the forty-five persons on its witness lists, both counsel testified that such nonadversarial, ex parte statements were not a sufficient substitute for

thorough discovery depositions. TH 118-19, 172-74. (<u>See also</u> TH 289. Of the forty-five witnesses listed by the state, the defense had investigated only one noncentral witness -- the record keeper at the correctional facility. There were at least thirty witnesses provided by the state of which the defense had no prior knowledge. TH 175. Of the eighteen witnesses presented at trial, counsel had prior knowledge of only seven and then only from nonadversarial statements taken by the state. As the prosecutor emphasized during trial, counsel never contacted the witnesses though they were willing to talk. T 25. Even the defense witnesses were not investigated. Of the seven witnesses listed by the defense on its witness list only two had been spoken with by the defense.[12] Moreover, of the forty-one items of physical evidence introduced at trial by the prosecution, the defense had examined none, though it was available for inspection, as the prosecutor continually reminded the court and jury (e.g. T 222, 237, 247, 277-78).

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS MISAPPLIED <u>STRICKLAND V. WASHINGTON</u> BY APPLYING A DISTINCTION, EXPRESSLY DISAPPROVED BY THIS COURT, BETWEEN IMPEACHMENT AND EXCULPATORY EVIDENCE IN THE DETERMINATION OF PREJUDICE RESULTING FROM THE DENIAL OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, BY HOLDING THAT PREJUDICE COULD NOT BE ESTABLISHED ON THE BASIS OF COUNSEL'S FAILURE TO IMPEACH CRUCIAL PROSECUTION WITNESSES IN A CLOSELY BALANCED CASE, BUT RATHER REQUIRED PRODUCTION OF AFTER-DISCOVERED EVIDENCE AFFIRMATIVELY SUPPORTING INNOCENCE.

"Prejudice" is the only issue in this case. Did the court of appeals' majority properly apply the "prejudice prong" announced by the Court in <u>Strickland v. Washington</u>, ___ U.S. ___, 104 S.Ct. 2052 (1984)? Specifically did the majority below misapply <u>Strickland</u> by holding that ineffective counsel's failure

---

12 This witness list was filed on the day of trial, despite the requirement that it be filed within seven days of the receipt of the state's answer to discovery (filed in this case two months previously). <u>Fla.R.Crim.P.</u> 3.220(b)(3). The late filing of this list further demonstrates counsel's unpreparedness as does the fact that defense counsel listed "witnesses" that he had not even contacted. Moreover, though the defense at trial turned out to be an alibi, counsel never filed a "notice of alibi" as required by the rules before presenting witnesses other than the defendant.

to impeach the prosecution's key witnesses (also suspects) cannot alone establish prejudice, but that only counsel's failure to present evidence affirmatively and "clearly" showing Mr. Aldrich's innocence can?

Three reasons make this case appropriate for certiorari. First, the court of appeals has read into Strickland's test for prejudice resulting from ineffective assistance of counsel a distinction between "impeachment" and "exculpatory" evidence that this Court has expressly rejected in evaluating the prejudice associated with the prosecution's failure to disclose evidence favorable to the accused. Second, the court of appeals' distinction between "impeachment" and "exculpatory" evidence has caused it to ignore the fundamental teaching of Strickland that prejudice should be measured by the materiality of the omitted evidence rather than by its artificial categorization as "impeachment" or "exculpatory." Third, this case presents the ideal record for the Court's explication of the true meaning of "prejudice" in situations where "a verdict or conclusion [is] only weakly supported by the record," Strickland, 104 S.Ct. at 2069, and where counsel's deficiencies resulted in a failure to weaken the prosecution's marginal proof still more. This is a case where "innocence" is truly at issue because of the slimness of the prosecutive proof, where all courts with jurisdiction have found counsel to be deficient in the gross lack of preparation, but where, notwithstanding, the defendant's death sentence has been sustained. Without the Court's correction of the court of appeals' misapplication of Strickland, Mr. Aldrich and others like him -- convicted of capital murder on evidence that is weak, without the effective assistance of counsel, but without the ability to show their innocence affirmatively and "clearly" -- will die, never having had a fair and reliable trial.

As brief background, the offense in the instant case involved an unwitnessed killing that occurred during a robbery. There was no physical evidence implicating Mr. Aldrich and no custodial statement. The key actors at the trial included Charles Strickland, a felon who illegally purchased, used, owned,

disposed of and lied about the murder weapon, and who said that Mr. Aldrich borrowed that weapon before the offense, telephoned him afterwards to say he had had to shoot a man, and wanted Strickland's help in getting rid of the weapon. On the other side was Mr. Aldrich who testified that he had nothing to do with the robbery/murder, but rather was fishing and thereafter in a bar during the time that the offense was carried out. Thus, as Judge Johnson explained "there was no one piece of conclusive evidence ... that would have precluded an effective defense. Nor was there an overwhelming amount of evidence from which a jury could draw but one conclusion." 777 F.2d at 644; App. 15a (Johnson, J., dissenting). In summary, "the outcome [of the trial] depended upon which of two stories the jury believed, where there were substantial reasons to disbelieve either one." Id.[13]

In this setting in which the evidence was so closely balanced that even slight changes in the evidence would tip the inferences to be drawn from it toward either side -- in which the assistance of counsel is most crucial precisely because the facts do not weigh toward a particular result -- counsel utterly failed to carry out his duties to investigate, discover, and prepare to meet the prosecution's case. Because of an extreme case overload in the public defender's office, counsel moved for and fully anticipated a continuance of the trial, having only begun to prepare the case a week before trial, having done only the barest of investigation, and not having deposed the state's

---

13 The case was summarized succinctly by Judge Johnson's opinion.

> Petitioner was convicted on the basis of evidence that was far from strong. No physical evidence implicating Aldrich was recovered at the scene of the killing. While in custody, Aldrich made no statements resembling a confession. The only direct evidence implicating Aldrich was testimony from a convicted felon who had violated the terms of his parole and lied to police investigators, and who was the other most likely suspect in the crime. It is in light of this record that counsel's errors take on their full significance.

777 F.2d at 642; App. 13a.

witnesses as is the right of every Florida criminal defendant.[14] When the continuance was denied, as counsel testified, they were "caught sleeping" and were manifestly unprepared: "I don't recall going to trial, even on a misdemeanor case, in the state of readiness we were in at that time."

The results of this deficient lack of preparation were three-fold. First, counsel's deficient representation lost powerful means of impeaching the two key state witnesses, Charles Strickland and Norman Sapp, by evidence showing their motive and opportunity for committing the offense and for blaming it on Mr. Aldrich. Second, counsel lacked the ability to corroborate Mr. Aldrich's alibi by independent investigation and even by information counsel already had but of which counsel was unaware or unprepared to use. Third, counsel was forced to conduct a "seat-of-the-pants" "fishing expedition" in examining witnesses with the predictable result of eliciting highly prejudicial and otherwise inadmissible testimony.

"Prejudice" as defined by Strickland[15] was established by these facts, but the court of appeals misapplied that standard by

---

14 Though it is recognized that most jurisdictions (including federal) do not grant the right to pretrial depositions, since it is an absolute right in Florida, depositions are the primary investigative tool in Florida. Their importance is beyond question. See Valle v. State, 394 So.2d 1004 (Fla. 1981) (capital conviction reversed because counsel had only been able to depose 24 of the 59 state witnesses, without regard to what those depositions may have revealed).

15 The law on prejudice from ineffective representation of counsel has undergone significant evolution in this case since the collateral proceedings were begun in 1979. When the state post-conviction motion was filed, the only published standard for evaluating such claims was a "mockery and farce" test. When the case was heard and decided at the state trial and appellate level on post-conviction, the prejudice standard was the "outcome determinative" test of Knight v. State, 394 So.2d 997 (Fla. 1981). Then in the federal district court on habeas corpus the case was governed by first the panel and then the en banc decisions in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B) (en banc). When then reviewed by the court of appeals, the Court's decision in Strickland v. Washington had been announced.

holding that in order to demonstrate prejudice a defendant must show new, after-discovered evidence affirmatively and "clearly" supporting his innocence. It held that even in a case where the "verdict [was] only weakly supported by the record," a defendant whose trial lawyer was found (by every Florida and federal court with jurisdiction) to have fallen short of the "performance" prong of Strickland by failing adequately to investigate, discover, and prepare to meet the prosecution's case, could not satisfy the "prejudice" prong merely by establishing that counsel had thereby kicked away available and powerful means for impeaching the credibility of the two crucial prosecution witnesses. Rather the majority held that he must also (or instead) show some affirmative evidence of innocence neglected by counsel: that prejudice could be shown only by producing "evidence ... in ... post-conviction proceedings ... that could have been discovered and presented at trial that would have clearly corroborated Aldrich's alibi or supported [trial counsel's] ... speculation" that other persons had committed the capital offense. 777 F.2d at 636; App. 7a.

The court of appeals' majority applied this "new affirmative evidence of innocence" test despite its recognition of the importance of the state's two witnesses and the materiality of the impeachment lost by counsel's lack of preparation. It acknowledged that defense counsel failed to discover and present facts impeaching the credibility of Charles Strickland "who furnished the only direct evidence that Aldrich committed the murder," 777 F.2d at 637; App. 8a, and failed to conduct an adequately prepared cross-examination of Charles Strickland and another witness, who provided "[s]ome of the most damaging testimony" against Mr. Aldrich, 777 F.2d at 635; 6a. The lost impeachment evidence would have substantiated defense counsel's "speculation" that these witnesses had a "motive for committing the robbery" themselves and thus a motive for lying and blaming

Mr. Aldrich.[16] As Judge Johnson explained, because of counsel's lack of preparation "Aldrich did not have the benefit of effective cross-examination that is critical to the fact-finding process." "[I]f Strickland's testimony had been anticipated, counsel could have brought out information that would have strongly impeached Strickland's credibility ... [by showing his] motive to both commit the crime himself and to place the blame on Aldrich." 777 F.2d at 643; App. 14a (Johnson, J., dissenting).

Closely related to its "new evidence of innocence" rule. The court of appeals' majority opined that even if impeachment could be used to establish prejudice, it would be insufficient to show prejudice unless every witness, including collateral witnesses, would have been impeached such that there was no competing evidence at all. It held that the failed impeachment of the two key prosecution witnesses (Charles Strickland and Norman Sapp) was "insufficient" to establish prejudice because nothing had been shown to "impugn" the testimony of another witness, Lillie King (who lived with Strickland and Sapp), that Strickland was with her at the time of the robbery.

---

16 The majority sketched an outline of this impeachment evidence:

> Strickland was living with Norman Sapp's brother, Leonard, and Leonard's wife and children. These living arrangements had been made by Norman after he and Strickland were released from prison. Before the trial, Aldrich told his counsel that Strickland was having an affair with Leonard's wife. Strickland allegedly told Aldrich that he wanted to run off to North Carolina with Leonard's wife and therefore needed money. Strickland also allegedly asked Aldrich to commit a robbery for him at a store where Strickland knew the clerk, and when Aldrich refused, this allegedly precipitated hard feelings between Strickland and Aldrich.

777 F.2d at 636; App. 7a. Judge Johnson also summarized the lost evidence impeaching Strickland:

> he was planning to leave for North Carolina with the wife of Leonard Sapp, the brother of Aldrich's former roommate, Norman Sapp, and that he needed money in order to make the move. It was for this purpose that he asked Aldrich to help rob a grocery store. Strickland was apparently angered not only by Aldrich's refusal to help him in his effort, but also by Aldrich's failure to approve of Strickland's relationship with Sapp's wife.

777 F.2d at 643; App. 14a.

In both respects, the majority's reasoning materially misconstrues Strickland and the evidence in this case. As Judge Johnson pointed out "the issue is not whether the jury, based on a review of all the facts, came to the right conclusion." 777 F.2d at 644; 15a (Johnson, J. dissenting). It is not for the court to sit as a second jury to reach a verdict. Rather the question is whether it is reasonably likely that a jury, hearing those facts, could have decided differently -- whether the lost impeachment (including the affirmative evidence of Strickland's motive and opportunity to commit the offense and his motive for blaming Mr. Aldrich) was "material." Manifestly it was. Though there were competing versions of this offense, Strickland does not propose that all competing evidence be eliminated before prejudice can be shown. To say that one remaining witness who testified as to a collateral matter defeats prejudice on an already weak prosecutive case would set up an impossible burden and one not intended by the Court.[17]

Strickland requires no more than a showing that counsel's errors had a significant, rather than "trivial" or "isolated," effect "on the inferences to be drawn from the evidence." 104 S.Ct. at 2069. In a case where "the outcome depended on which of two stories the jury believed, where there were substantial reasons to disbelieve either one," 777 F.2d at 744; App. 15a (Johnson, J., dissenting), counsel's failure to add to the unbelievability of the prosecutor's story, by impeachment evidence showing that the state's two key witnesses had a motive for committing the offense and for blaming it on Mr. Aldrich, plainly had a significant effect on the inference of credibility "to be

---

17 The witness, Lillie Fay King, relied upon by the majority as determinative, lived with the key state witness, Strickland, and may have been a part of his scheme for committing the offense and because of their close (or custodial) relationship had a reason to fabricate. Regardless, the defense never contended that Strickland committed this offense alone. He and Norman Sapp are the suspects together and Strickland may well have set up an alibi while Sapp robbed and murdered Ward.

drawn from the evidence," even though one of the state's witnesses' partial alibi "defense" was left unimpugned in the eyes of the reviewing court.

Accordingly, the court of appeals' majority has misapplied Strickland. It has done so on a distinction between impeachment evidence and new exculpatory evidence that this Court has expressly rejected in the closely connected area of Brady violations.[18] The Brady prejudice standard and the Strickland prejudice formulation are the same. The court of appeals failed to recognize the Court's controlling precedent on this issue.

In applying the very same prejudice test that was articulated in Strickland to the failure of the prosecution to disclose favorable evidence, "[t]his Court has rejected any such distinction between impeachment evidence and exculpatory evidence." United States v. Bagley, ____ U.S. ____, 105 S.Ct. 3375, 3381 (1985). The Court rejected such a distinction in that context because "the 'reliability of a given witness may well be determinative of guilt or innocence.'" Giglio v. United States, 405 U.S. 150, 154 (1972). The failure to impeach the key witnesses in an already weak case thus can, without more, establish prejudice. As the Court has recognized: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959).

The court of appeals failed to recognize that the prejudice standard expressed by these Brady decisions also governs the prejudice standard to be applied where a defendant has been denied his constitutional right to the effective assistance of

---

18 Brady v. Maryland, 373 U.S. 83 (1963) (prosecution's withholding of evidence favorable to the accused denies due process).

counsel. The Court in Strickland expressed the prejudice standard to be applied:

> a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

104 S.Ct. at 2068. As it had done in the Brady cases, the Court rejected a "more likely than not" or preponderance of the evidence test, in favor of a burden of showing that "the decision reached would reasonably likely have been different absent the errors." Id. at 2069. Thus, the standard was drawn from the test of "materiality" announced in United States v. Agurs, 427 U.S. 97, 104 (1976) and United States v. Valenzuela-Bernal, 458 U.S. 858 (1982). The prejudice standard of Strickland is a "formulation of the Agurs test for materiality." United States v. Bagley, 105 S.Ct. at 3384.[19] Just as several lower courts had erroneously devised different standards for prejudice in the Brady context depending upon the characterization of the lost evidence, the court majority below has misread Strickland by restricting prejudice to new exculpatory evidence.

By limiting its prejudice inquiry to whether the lost evidence was "clear" new exculpatory evidence or merely impeachment, the court of appeals has not only misapplied the Strickland/Agurs analysis, but has eschewed the materiality analysis suggested by the Court in favor of a mechanical test. Such a test miscomprehends the essence of the inquiry into prejudice. In Strickland the Court explained the method of analysis for making the determination of prejudice. The Court emphasized that

---

19 As the court explained in Valenzuela-Bernal, there must be a "plausible showing of how [the unavailable] testimony would have been both material and favorable to [the] defense." 458 U.S. at 867. "Materiality" the Court explained "'is a concern that the suppressed evidence might have affected the outcome of the trial.'" Id. at 868 (quoting United States v. Agurs, 427 U.S. at 104 (emphasis supplied)).

"the question is whether tnere is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." 104 S.Ct. at 2069. In making this determination of whether "the decision reached would reasonably likely have been different absent the errors [of counsel]," id. (emphasis supplied), the reviewing court must "consider the totality of the evidence" by comparing the "affected" and "unaffected" findings. Id. The Court emphasized two important considerations in this determination. First, "[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture ...." Id. (emphasis supplied). And second, that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by [counsel's] errors." Id. It is therefore evident that the focus in determining prejudice must be on the "materiality" of the lost evidence in the particular case and not, as the majority below held, on the characterization of the lost evidence as impeachment or as after-discovered exculpatory evidence.

Rather than its mechanical approach, had the court of appeals undertaken a materiality inquiry that compared the "affected" and "unaffected" areas of the evidence, the "prejudice" prong of Strickland would have been satisfied. There were few areas of the evidence in this case that were "unaffected." This is so because the ineffective failure to prepare was so complete that virtually every area of the case was affected. The lack of investigation truly "had a pervasive effect on the inferences to be drawn from the evidence." Strickland, 104 S.Ct. at 2069. The case was based entirely on inferences, as a credibility contest between the illegal owner of the murder weapon who admitted prior perjury and Mr. Aldrich. "This case required the jury to unravel and choose between two conflicting versions of a murder." 777 F.2d at 642; App. 13a (Johnson, J.,

dissenting). In such a balanced setting even a small changes in those inferences could have likely shifted the outcome.[20]

The "affected" area of this case was the testimony of the two key prosecution witnesses. Had counsel been prepared he not only would have impeached their testimony still more, but he would have demonstrated their motive and opportunity to commit the offense and the motive for blaming Mr. Aldrich. Such testimony would have "alter[ed] the entire evidentiary picture." Strickland, 104 S.Ct. at 2069. The prosecution's case would have been essentially gutted by such evidence -- at the very least the "inferences to be drawn from the evidence" would have been dramatically shifted.

This inference-shifting impeachment was not the only "affected" area of the case. In addition to that major area of prejudice stemming from counsel's subprofessional performance, there were two other primary areas. First, counsel was unable to support the defense case even by information that counsel already had, but because of lack of preparation were unable to use. For example, Joyce Marshall, a security guard at a company near Al DiVagno's restaurant, testified at trial that at 1:00 a.m. on the night of the crime she saw a car that appeared to be Mr. Aldrich's car leaving a nearby warehouse (where, according to

20 As the Brady cases and Strickland make clear, a defendant need not show that the altered inferences to be drawn from the evidence that were favorable to him would have been more reasonable or more convincing than the inferences against him. Rather the Strickland/Agurs prejudice test requires only a showing that "the choice between the two interpretations would have been one the jury could have made either way had they heard the facts." Smith v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984). That the omitted evidence "could reasonably have led a jury to disbelieve" the accusations against the defendant, Brown v. Wainwright, 785 F.2d 1457, 1466 (11th Cir. 1986), is sufficient to show a reasonable likelihood that the omission of the evidence would have affected the outcome.

Charles Strickland, the shotgun was hidden following the crime). T 280-85. She was certain of the time because she punched a watchman's clock every twenty minutes. T 283. This time is highly significant, for Mr. Aldrich testified that he was still at Jo Ann's Quarter Bar at 1:00 a.m., and this aspect of his testimony could have been corroborated. In pretrial interviews with defense counsel's investigator, both the bar owner and her cleanup man confirmed that Mr. Aldrich was in the bar at 1:00 a.m. PCR 244, 247, 252.[21] Given Ms. Marshall's certainty of the time that she saw the car, this corroborative evidence also would have supported the other aspect of the defense theory of the case: that someone other than Mr. Aldrich was driving a car which looked like Mr. Aldrich's car on the night of the crime, and that this person, not Mr. Aldrich, committed the crime. Such facts could well have shifted the balance of credibility in favor of Mr. Aldrich.[22]

Additionally, one of the most important pieces of the prosecutor's proof could have been directly contradicted by information that counsel already possessed but were unprepared to use. Strickland testified that he drove a friend (Lillie King) to a hospital at midnight and returned home "around" 1:00 a.m. on September 3, 1974, the time during which the crime occurred.

---

21 After trial, counsel filed an affidavit by the bar owner that Mr. Aldrich was in her bar that night. Though too late in the proceedings to have a legal effect, the tardy affidavit is further demonstration of what prepared counsel could have presented.

22 The majority below failed to consider this aspect of prejudice, for it misunderstood the facts proffered by Mr. Aldrich. It erroneously stated that Joyce Marshall's sworn pretrial statement indicated that she saw the car between 12:00 a.m. and 12:30 a.m. The panel then analyzed this point as relating to counsel's failure to impeach Ms. Marshall at trial. 777 F.2d at 637; App. 8a. This was not the point being argued by Mr. Aldrich. The only prior notice of Ms. Marshall's testimony came from a police officer's summary of what she would say, given at the preliminary hearing. PCR 268. Thus, there was no genuine impeachment issue. The issue instead was the confirmation of both the alibi defense and the "someone else did it" defense that could have been effected through Ms. Marshall's testimony, had the testimony of the bar owner and bar employee been presented. See 777 F.2d at 643-44; App. 14a-15a (Johnson, J., dissenting).

Shortly after his return from the hospital, Strickland said he received the telephone call in which Mr. Aldrich told him he had killed someone.

However, the sworn pretrial statement of Leonard Sapp seriously drew into question whether Strickland received this call. At the time of this incident, Strickland was a guest living in Leonard Sapp's home. When Strickland returned to Mr. Sapp's home at about 1:30 a.m. on September 3, Mr. Sapp "was up." After Strickland arrived, Mr. Sapp "went to the kitchen ... and got some water," then went to bed. As far as he knew, Strickland went to bed at the same time. No telephone call nad been received by Strickland up to tnis time. Althougn Mr. Sapp said the telephone might have rung after that and been answered by Mr. Strickland without his knowing it, it was not likely, because Strickland "don't usually answer the phone." The only reason Strickland would usually answer the telephone would be "[i]f we were all up and if I tell him to answer it ...." Id. For these reasons, when asked by the state attorney whether Strickland received a telephone call after he returned from the hospital that night, Mr. Sapp said, "Not as I know of."

While Strickland's testimony was already suspect, this evidence would have provided an additional reason, far stronger than the others, for doubting his truthfulness. Unlike the other evidence that raised questions about Strickland's truthfulness, this evidence drew into question whether Strickland actually received the incriminating telephone call from Mr. Aldrich. Perhaps more importantly the time difference (1:00 to 1:30 a.m.) also shows more than Strickland's untruth: it affirmatively demonstrates his opportunity to commit the offense that he was motivated to undertake.[23] Because this evidence questioned the

---

23 The security guard said that she saw the car at exactly 1:00 a.m. -- when the occupant of the car was presumably hiding the murder weapon. Witnesses could have been called to testify that Mr. Aldrich was, as he said, in the bar at 1:00 a.m. and therefore could not have been in the car that the security guard saw at her location miles away. And Leonard Sapp, had counsel been prepared enough to ask, would have testified that Strickland was not home at 1:00 a.m. and thereby established Strickland's opportunity to have been occupant of the car that was seen by the security guard.

reliability of the most important aspect of the state's evidence, it likely could have altered the balance of credibility against Strickland.

Added to counsel's inability to meet the prosecution's case and to corroborate the defense, are the areas of affirmative harm occasioned by counsel's unpreparedness. Since he had no prior knowledge of most of the witnesses he was forced to violate a cardinal rule of trial practice -- that in examining witnesses one does not ask a question unless the answer is already known. Instead counsel was forced into a "fishing expedition" in conducting seat-of-the-pants examination of witnesses. The predictable result was elicitation of some highly harmful testimony that otherwise would have been patently inadmissible. This evidence included threats impliedly made by Mr. Aldrich against a witness,[24] unrelated collateral offenses connected with Mr. Aldrich's supposed plans to become a "hit man"[25] and Mr. Aldrich's entire criminal and prison disciplinary record in

---

24 This was elicited as a complete surprise to defense counsel during his cross-examination of Norman Sapp, an important witness about whom counsel had little prior information. Sapp's testimony about receiving threats over the telephone was highly prejudicial since the unsupported inference was left for the jury that Mr. Aldrich had made those threats. Because those purported threats were unconnected by evidence to Mr. Aldrich, however, Sapp's testimony was inadmissible. It could have been avoided if counsel had known of the testimony beforehand through deposition. See, e.g., Duke v. State, 106 Fla. 205, 142 So. 886 (1932); Jones v. State, 385 So.2d 1042, 1043 (Fla. 1st DCA 1980) ("the admission of such evidence could only serve to create undue prejudice in the minds of the jury against the accused").

25 This testimony was presented by the state without objection by defense counsel, because this testimony too came as a total surprise to counsel. (In fact counsel did have prior notice of this testimony through the state attorney's pretrial conference with counsel's investigator, but counsel's failure to prepare led to his "total surprise" when this testimony was presented.) Such evidence was inadmissible under Florida's Williams rule for it was irrelevant to any issue in the case. Williams v. State, 110 So.2d 654 (Fla. 1959). The prejudice could have been avoided but cannot be doubted. See, e.g., Michelson v. United States, 335 U.S. 469, 475-76 (1948); United States v. Taglione, 546 F.2d 194, 199 (5th Cir. 1977).

specific detail.[26] Accordingly, counsel's lack of preparedness caused a seat-of-the-pants examination of witnesses that resulted directly in serious affirmative harm to the defense case that was otherwise preventable.[27]

In evaluating prejudice it should also be considered that in addition to the specific areas outlined above, there are innumerable other unidentifiable areas "affected" by the total lack of pretrial preparation. Since this case involves not the failure to investigate one or two areas or witnesses, but rather involves a total failure to prepare regarding all areas of the case, the lack of preparation is so pervasive as to make its detrimental effect impossible to fully identify (without perhaps retrying the entire case). TH 156, 198, 199, 311. For example, counsel was forced to conduct admittedly seat-of-the-pants cross-examination, because he did not know the answers to the questions he wanted to ask. TH 189-90, 198-99, 233-34. Counsel only learned of the subject of many of the witnesses' testimony when they testified. T 362. Counsel felt restrained throughout the trial in cross-examining witnesses, wanting to ask questions of witnesses but being unable to do so, not knowing the answers and thus foregoing potentially important evidence. TH 189-190, 198-199, 300.

Though from the discussion above we know some of the major areas of evidence that would have been revealed in pretrial

---

26 The rule in Florida is that the details of a witness's prior criminal record are inadmissible for impeachment. See, e.g., Cummings v. State, 412 So.2d 436 (Fla. 4th DCA 1982). This highly prejudicial evidence was elicited by the state only because the defense opened the door by counsel's uninformed questioning. T 436. The court finally had to step in to cut off such questioning. T 440. It, again, could have been avoided had counsel been prepared.

27 Though the majority said that "the link between" the eliciting of this affirmatively harmful testimony and counsel's ineffective representation was "too tenuous to require a reversal of the [district court's] finding of no prejudice," 777 F.2d at 637; App. 8a, there is no other explanation but counsel's ineffectiveness for counsel bringing out such seriously prejudicial information against his client.

depositions,[28] we do not know and cannot know what other useful information may have been revealed by thoroughly probing deposition examination at that time.[29] Mr. Aldrich was denied rights given to all Florida criminal defendants, the rights to full pretrial discovery. Moreover, regardless of what information depositions would have revealed, at least counsel would have known the facts so as to be able to make reasonable strategy decisions. There are times when an inquiry into prejudice is "not worth the cost," Strickland, 104 S.Ct. at 2067, for the pervasiveness of the harm defeats an "intelligent, evenhanded application" resulting in "unguided speculation" into prejudice. Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978). Where the ineffectiveness is not limited to a few discrete identifiable errors, the prejudice is not only in what the lawyer did or the facts that were brought out, but also includes that which the lawyer was prevented from doing throughout the trial. Much of the prejudice thus is lost forever and is therefore unknowable. While such unknowable harm may not be relevant in cases where tne evidence is strong, it does deserve consideration where the evidence of guilt is weak, based solely on debatable inferences drawn from questionable testimony -- i.e. where "there was a substantial dispute over the underlying historical facts." United States v. Cronic, ____ U.S. ____, 104 S.Ct. 2039, 2050 n.37 (1984).

The areas of this case that were "affected" by counsel's deficient performance are therefore substantial. No area went untouched. Had the prosecution's case been weakened still

---

28 The state introduced at the post-conviction hearing notes from counsel's file of questions be proposed to ask at the depositions he had scheduled for the week after trial. These notes reveal that counsel sought to inquire into precisely the areas mentioned above but that he did not explore at trial because he had not taken those depositions.

29 For example, whether Strickland and Sapp would have given even more inconsistent statements at deposition for use as impeachment cannot be known, because such depositions cannot be reconstructed years after the trial. Such evidence is lost forever.

further by not only the impeachment of its key evidence but by the evidence of the key witnesses' motive and opportunity to commit the crime; had Mr. Aldrich's alibi been corroborated as it surely could have been; and had counsel's own uninformed witness examinations not done grave harm to Mr. Aldrich by eliciting otherwise condemned evidence, at the very least "the decision reached would reasonably likely have been different." Strickland, 104 S.Ct. at 2069.

The prosecution put on its best case, practically without effective challenge, yet even so it was weak.[30] At the same time, "[b]ecause of his counsel's lack of preparation, Aldrich's story has never really been presented before a jury." 777 F.2d at 644; 15a (Johnson, J., dissenting). There is, from the record in this case, a reasonable likelihood that Mr. Aldrich is innocent, and the prejudice question, undecided by the majority, is whether counsel's deficient conduct was material to that determination.

Certiorari is therefore warranted because the court of appeals materially misconstrued the Court's explication of prejudice resulting from constitutionally deficient representa-

---

30 The dissenting opinion in the divided affirmance of Mr. Aldrich's conviction and sentence on direct appeal in the Florida Supreme Court, found that though the evidence was technically sufficient to support a guilty verdict, it was too weak to permit a death sentence because of the significant risk of executing an innocent person. The opinion summarized the evidence:

> [T]he only evidence of substance tying appellant to the crime was given by a convicted felon [Charles Strickland] who had purchased and possessed the murder weapon in violation of conditions of his own parole. The witness admitted at trial that he had committed perjury by lying under oath to police in connection with statements made about this crime. He further admitted he feared being returned to prison for buying and lending the death weapon to appellant. He had compelling reasons to implicate appellant or anyone else in the crime, since his gun was proven to have been used in the killing.

Aldridge v. State, 351 So.2d 942, 944-45 (Fla. 1977) (Boyd, J. dissenting). This asssessment of the weakness of the evidence was made before it was known that counsel had ineffectively prepared this case.

tion. The issue is narrowly drawn as to whether impeachment evidence, as opposed to after-discovered exculpatory evidence, can demonstrate prejudice in an already weak prosecutive case.

The prejudice to Mr. Aldrich from being placed on trial for his life with unprepared counsel cannot be doubted. There is a serious and somber risk of mistake in this case that can only be corrected by the Court.

MR. ALDRICH WAS DEPRIVED OF THE INDIVIDUALIZED SENTENCING DETERMINATION REQUIRED IN CAPITAL CASES BY THE EIGHTH AMENDMENT BECAUSE THE AUTHORITATIVE PRE-LOCKETT APPLICATION OF FLORIDA LAW TO PRECLUDE CONSIDERATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES EXCLUDED THE ONLY MITIGATING FEATURE OF RECORD IN HIS CASE -- RESIDUAL DOUBT ABOUT GUILT.

Despite the mandate of Lockett v. Ohio, 438 U.S. 586 (1978), Florida law as announced and enforced by the Supreme Court of Florida continues to strictly prohibit, as a matter of law, consideration of "residual doubt" about the capital defendant's guilt in determining whether that defendant should live or die:

> A convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

Buford v. State, 403 So.2d 943, 953 (Fla. 1981). Accord Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985) (citing Buford). As Justice Marshall noted in finding a Lockett violation in another case where the judge had found that the jury had relied upon "an 'invalid' mitigating circumstance stemming from residual feelings of doubt as to guilt," this principle "seems to have been enshrined in Florida law." Heiney v. Florida, ___ U.S. ___, 105 S.Ct. 303, 304 (1984) (Marshall, J., dissenting from the denial of certiorari). See also Burr v. Florida, ___ U.S. ___, 106 S.Ct. 201 (1985) (Marshall, J., dissenting from the denial of certiorari) (same).

In contrast, this Court has recently recognized as legitimate the need to permit juries to consider "residual doubts" in determining the appropriate sentence in a capital case. Lockhart v. McCree, ___ U.S. ___, 54 U.S.L.W. 4449, 4454 (May 5, 1986). As quoted by the Court:

> "jurors who decide both guilt and penalty are likely to form residual or 'whimsical' doubts ... about the evidence so as to bend them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases."

Id. (quoting Grigsby v. Mabry, 758 F.2d 226, 247-48 (8th Cir. 1985) (en banc) (J. Gibson, J., dissenting)). Accord Smith v. Wainwright, 741 F.2d 1248, 1255 (11tn Cir. 1984); Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. 1981) (Unit B). Cf. King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) ("circumstantial evidence which however strong leaves room for doubt ... might convince a jury and a court that the ultimate penalty should not be exacted, lest a mistake may have been made"). In responding to the dissent in Lockhart concerning Florida's (as well as several other states') exclusion of "residual doubt" from the capital sentencing determination, the Court found that exclusion to "justify skepticism" concerning those states' procedures. 54 U.S.L.W. at 4454.

The importance of residual doubt concerning guilt in the capital sentencing determination cannot be questioned, nor can its legitimacy. Residual doubt about guilt "would be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" Skipper v. South Carolina, 54 U.S.L.W. at 4404 (quoting Lockett v. Ohio, 438 U.S. at 604). Likewise, there is "no disputing" the Court's Eighth Amendment mandate that "'"the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense..."'" Skipper v. South Carolina, ___ U.S. ___, 54 U.S.L.W. 4403, 4404 (April 29, 1986) (quoting Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (original emphasis)).

Such residual doubt about guilt was at issue in the present case, but was excluded from consideration by the sentencing jury and judge by the operation of Florida law. That it is an important consideration in the present case can be seen by its application by the dissenting opinion in the Florida Supreme Court in the direct appeal of this case. Justice Boyd opined that though "[i]t may very well be true that appellant is the murderer," the proof of guilt was too tenuous to support a death sentence: "this Court is not permitted to approve a sentence of death until each case is weighed by the criteria stated in the statute. The facts shown by the record do not afford a lawful basis for ... infliction of capital punishment." Aldrich v. State, 351 So.2d at 945 (Boyd, J., dissenting).[31]

Although Florida law still plainly precludes as a matter of law, the consideration in sentencing of "residual doubts" about the evidence of guilt, and as will be set out below, such consideration was excluded from the process of sentencing Mr. Aldrich, the court of appeals did not resolve the Eighth Amendment question. Rather, the court found that review was barred under Wainwright v. Sykes, 433 U.S. 72 (1977) because it found a "procedural default." 777 F.2d at 638; App. 9a. The "default" relied upon by the court of appeals is not a bar to review by the Court, since that default finding was based upon a misperception both of the record in this case and of the issue presented.

As to the court of appeals' misconception of the record, it overlooked the fact that the Florida Supreme Court ruled upon "residual doubt" as it pertains to the propriety of the death

31 Even as it stands, without consideration of residual doubt about guilt, the death sentence is far from being overwhelmingly supportable. The only aggravating factors are those inherent in the conviction itself, i.e. felony murder. The felony murder here was not one that was "set apart from the norm," State v. Dixon, 283 So.2d 1 (Fla. 1973), and as such was an insubstantial basis upon which to rest a death sentence. See McCaskill v. State, 334 So.2d 1276 (Fla. 1977); Rembert v. State, 445 So.2d 337 (Fla. 1984).

sentence in affirming that sentence. To find a "default" the court of appeals quoted a portion of the opinion on direct appeal:

> "the trial court found no mitigating circumstances and Aldridge does not contest that finding on appeal."

777 F.2d at 638; App. 9a (quoting Aldridge v. State, 351 So.2d at 944 n.4). The court of appeals, however, failed to quote the remainder of the court's statement:

> Rather, Aldridge through his counsel, admitted the lack of mitigating circumstances and specifically requested the trial judge to impose the death penalty rather than incarcerating him for the minimum 25 years under our life statute. This request, of course, has no bearing on our decision. We have a duty to review the record in every case where the death penalty is imposed. Section 921.141(4), Fla. Stat. (1975).

Aldridge v. State, 351 So.2d at 944 n.4. (emphasis supplied).[32] Moreover, the dissent in the Florida Supreme Court expressly considered doubt about Mr. Aldrich's guilt as an independent reason invalidating the death sentence. Id. at 944-45 (Boyd, J., dissenting). Plainly the question was decided by the court. See Gardner v. Florida, 430 U.S. 349, 361 (1977) ("since two members of that court expressly considered this point on appeal in this case, we presume that the entire court passed on the question"). There can be no doubt that the Florida Supreme Court, in the exercise of its independent duty to review all evidence relative

32 The Florida court thus independently reviewed the propriety of the death sentence under its own rules. It has done the same in other cases. In Goode v. State, 365 So.2d 381 (Fla. 1979) the court refused the defendant's request to dismiss his appeal despite his "expressed desire to be executed," because "this Court must, nevertheless, examine the record to be sure that the imposition of the death sentence complies with all of the standards set by the Constitution, the Legislature and the courts." Id. at 384. In Davis v. State, 461 So.2d 67 (Fla. 1985), the defense had made an admitted "tactical decision not to [challenge the death sentence]." Id. at 71. Nevertheless the Court reviewed the death sentences because the statute "directs this Court to review both the conviction and sentence in a death case, and we will do so here on our own motion." Id. The court reviewed both the aggravating circumstances (and struck one) and the trial court's method of considering mitigating factors. Id. See also Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981) (defendant did not brief the imposition of the death sentence, but "still we must review the propriety of the death sentence" and then vacated that sentence, inter alia, because the judge restricted mitigation to the statutory factors).

to the sentencing determination, did review whether the trial judge appropriately found that there was no evidence of mitigating circumstances.[33] As the Florida court later explained, in its review of Mr. Aldrich's sentence:

> This Court clearly addressed the propriety of the aggravating and mitigating circumstances and the appropriateness of the death sentence in accordance with the law as it was established at the time of the decision of this case on the merits.... [T]his Court found that there were no mitigating circumstances and that there were adequate statutory aggravating circumstances to sustain the death penalty.

Aldridge v. Wainwright, 433 So.2d 988, 989 (Fla. 1983).[34]

Where it is quite obvious that the Florida Supreme Court neither as a general rule nor in this case in particular, accords any "waiver" with regard to either the propriety of the specific aggravating and mitigating factors or to the process by which the sentence was determined, there is simply no reason for the court of appeals to "find" such a waiver. Even where a defendant consciously and deliberately as a tactic does not challenge the death sentence, the court nevertheless reviews it -- and in particular, reviews for any limitations on consideration of mitigation, Davis v. State, supra; Jacobs v. State, supra.

---

33 See also Eddings v. Oklahoma, 455 U.S. 104, 113 n.9 (1982) (though the defendant did not in the state court challenge the restriction on mitigating factors as violative of the death penalty, the issue was appropriate for review because the appellate "court examined the aggravating and mitigating circumstances and held that Eddings' family history and emotional disorder were not mitigating circumstances that ought to be weighed in the balance").

34 The Florida Supreme Court has consistently held that it has an independent duty to review the propriety of the imposition of the death penalty in the direct appeal of each capital case. See, e.g., State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); Songer v. State, 322 So.2d 481 (Fla. 1975); Hargrave v. State, 366 So.2d 1, 4-5 (Fla. 1979); McCampbell v. State, 421 So.2d 1072, 1074 (Fla. 1982). In the exercise of this independent duty, the court reviews whether "all relevant data was considered" by the sentencer. LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978). Accordingly, even where a capital appellant's counsel "has not challenged the legal sufficiency of [his client's] convictions and sentences on any basis," id. at 150, the Florida court has held that it is "obligated by law and rule of this Court to ascertain whether they are proper." Id.

Accordingly, there is no procedural default which bars the Court's consideration of this claim. County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979). Accord Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9 (1975); Francis v. Henderson, 425 U.S. 536, 542 n.5 (1976).

Perhaps more critically, however, the court of appeals default finding misperceived the issue presented in a manner tnat inextricably intertwined the default "facts" with those supporting the merits of the Eighth Amendment question. As the Court is by now well aware, the Florida capital sentencing statute was applied at the time of Mr. Aldrich's trial (and appeal) -- prior to Lockett v. Ohio, 438 U.S. 586 (1978) -- in a manner that strictly limited the mitigating factors that could be considered to only those specifically set out in the statute.[35]

As Mr. Aldrich's trial counsel testified at the post-conviction hearing: "as far as the mitigating circumstances; yes, it was my opinion and I believe the [trial] Court was of the opinion, also, that it was limited to ... the statute." TH 191 (emphasis supplied). Counsel also emphasized that the one mitigating factor that Mr. Aldrich did not "waive" was doubt

---

35 Since the restrictive application of the pre-Lockett Florida law is presently before the Court in several cases that document that limiting application, Mr. Aldrich will not here burden the Court with additional repetition of that documentation. See Darden v. Wainwright, No. 85-5319, cert. granted, September 3, 1985; Hitchcock v. Wainwright, No. 85-6756, pet. for cert. filed, April 18, 1986; Wainwright v. Songer, No. 85-567, pet. for cert. filed, September 18, 1985; Sireci v. Florida, No. 84-6895, pet. for cert. filed, June 12, 1985. For present purposes it is sufficient to note, as the Florida Supreme Court only recently recognized, that "our death penalty statute could have been reasonably understood to preclude the introduction of nonstatutory mitigating evidence." Harvard v. State, ___ So.2d ___, 11 F.L.W. 55, 56 (Fla. February 6, 1986).

about his guilt.[36] However, because Florida law limited consideration of mitigating factors to only those in the statute, it was believed that doubt about guilt could not be presented in mitigation. Thus, with regard to the "waiver" found so determinative by the court of appeals, counsel testified that: "if [Mr. Aldrich] had known the state of the law as it is today [referring to Lockett], he might not have instructed me the same way." TH 215.

Accordingly, the very waiver upon which the court of appeals relied in finding a default was the very matter at issue. Because of the unconstitutional limitation on mitigating circumstances in the application of Florida law at the time, the record shows that the defendant, defense counsel, the prosecutor, the trial judge, and the Florida Supreme Court restricted the capital sentencing consideration to only statutory mitigating factors. Residual doubt about guilt was not among the statutory list -- and even today Florida excludes its consideration.

---

36 For example, when Mr. Aldrich sought to waive a penalty defense, the trial judge inquired by reading the list of statutory mitigating factors. T 605-606. At the conclusion of that reading, the following was said:

> MR. SCHWARZ [defense counsel]: Mr. Aldrich, while we are on the record, you have heard the court read to you the mitigating circumstances as set forth in the statute.
>
> THE DEFENDANT: Yes.
>
> MR. SCHWARZ: Do you have knowledge of any evidence that we could present in your behalf that would support any of these mitigating circumstances?
>
> THE DEFENDANT: Not any.
>
> MR. SCHWARZ: Other than the fact that you deny doing it?
>
> THE DEFENDANT: Yes, sir.

T 606-607 (emphasis supplied).

It is evident, therefore, that residual doubt about Mr. Aldrich's guilt was excluded from consideration in determining Mr. Aldrich's sentence and in reviewing the propriety of his sentence. By operation of Florida law -- both the now-discarded rule that restricted mitigation generally and the even-still-enforced preclusion of residual doubt in particular -- a powerful and relevant mitigating feature of the case was excluded from consideration in his case. The issue is the operation of Florida law to deny an individualized sentencing as mandated by the Eighth Amendment.

Certiorari is appropriate to permit review of the restricted pre-Lockett application of Florida law that resulted in this case in the preclusion of the only mitigating factor in the record that called for a sentence less than death.

CONCLUSION

For these reasons, petitioner prays that the Court issue its writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

RICHARD H. BURR III
Assistant Public Defender

BY _____
Counsel for Petitioner

A/586

(3)

No. 85-6954

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

==========

LEVIS LEON ALDRICH,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

==========

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

RICHARD H. BURR III
Assistant Public Defender

Counsel for Petitioner

29pp

INDEX TO APPENDIX

habeas corpus petition. The Court of Appeals, Roney, Circuit Judge, held that: (1) defendant failed to establish that he was prejudiced by deficient performance of defense counsel; (2) evidence did not warrant instruction on lesser included offense of second-degree felony-murder; and (3) issue relating to mitigating sentencing factor was barred by procedural default.

Affirmed.

Johnson, Circuit Judge, filed dissenting opinion.

1. Criminal Law ⇐641.13(1)

A defendant alleging ineffective assistance of counsel must establish two components: that his attorney's performance was deficient and that the deficient performance was prejudicial to the defense; failure to establish either prong will result in denial of a defendant's Sixth Amendment claim. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.13(1)

On a claim of ineffective assistance of counsel, prejudice can be presumed where there is an actual or constructive denial of counsel altogether, for whatever reason, and if there is a fundamental breakdown in adversarial process.

3. Criminal Law ⇐641.13(2)

Deficit performance of unprepared defense counsel did not constitute a constructive denial of counsel or breakdown in adversarial process such that prejudice could be presumed. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐641.13(6)

Defendant's allegations that identifiable areas of evidence were left undeveloped, that substantial impeachment of various witnesses could have been ascertained through deposition and utilized at trial, and that defense counsel's lack of investigation led him to engage in "fishing expeditions" on cross-examination that resulted in improper evidence being addressed, failed to establish prejudice so as to warrant relief from murder conviction on ground of inef-

Levis Leon ALDRICH, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Respondent-Appellee.

No. 84-5523.

United States Court of Appeals, Eleventh Circuit.

Nov. 19, 1985.

Petitioner, who was convicted of first-degree murder, and sentenced to death, appealed from decision of the United States District Court for the Southern District of Florida, Joe Eaton, J., denying his federal

fective assistance of counsel. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.13(6)

As relating to a defendant's allegation of ineffective assistance of counsel, failure to interview or take depositions of state's witnesses for impeachment purposes is not prejudicial per se.

6. Homicide ⇐308(5)

Evidence in prosecution for first-degree murder was insufficient to show facts necessary for second-degree felony murder conviction under Florida law and, thus, no such instruction was constitutionally required.

7. Habeas Corpus ⇐45.3(1.30)

Issue not asserted at trial or on appeal of petitioner's murder conviction was foreclosed from collateral attack in state court and, therefore, barred from consideration in federal court.

Richard H. Burr, II, Craig S. Barnard, Asst. Federal Public Defenders, West Palm Beach, Fla., for petitioner-appellant.

Joy Shearer, Asst. Atty. Gen., West Palm Beach, Fla., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, FAY and JOHNSON, Circuit Judges.

RONEY, Circuit Judge:

Levis Leon Aldrich was convicted of first degree murder in Florida and sentenced to death. In this appeal from the denial of his federal habeas corpus petition, he raises three claims: (1) that he received ineffective assistance of counsel at his trial; (2) that the trial judge erred by not instructing the jury on second degree felony murder; and (3) that the trial judge excluded doubt about Aldrich's guilt as a nonstatutory mitigating factor at Aldrich's capital sentencing hearing. We affirm.

Since the three-day trial in January 1975, in which the jury found Aldrich guilty of murder in connection with an armed burglary, his conviction and death sentence, in which the court followed the jury's recommendation, have been subject to much litigation in the state courts.[1]

In June 1983, Aldrich filed his first federal habeas corpus petition. Although many grounds for relief were asserted, all have apparently dropped by the way except the three issues asserted by able and experienced counsel on this appeal.[2]

I. INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

The ineffective assistance of counsel claim turns essentially on whether this Court should reverse the decision of the state courts and the federal district court that the failure to take discovery depositions and to properly investigate the case prior to trial did not work to the defendant's substantial disadvantage.

[1] Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant alleging ineffective assistance of counsel must establish two components: that his attorney's performance was deficient and that the deficient performance was prejudicial to the defense. *Id.* at ——, 104 S.Ct. at 2064–65, 80 L.Ed.2d at 693; *see also King v. Strickland*, 748 F.2d 1462, 1463 (11th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 2020, 85 L.Ed.2d 301 (1985). Failure to establish either prong of the *Washington* standard will result in denial of defendant's Sixth Amendment claim. *Washington*, 466 U.S. at ——, 104 S.Ct. at 2069–70, 80 L.Ed.2d at 699–700. Although a district court's findings of fact are subject to the clearly erroneous rule, "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Id.* at ——, 104 S.Ct. at 2070, 80 L.Ed.2d at 700.

1. The Florida Supreme Court affirmed. *Aldridge v. State*, 351 So.2d 942 (Fla.1977) (per curiam), *cert. denied*, 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978). An application for relief pursuant to *Pressnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978) was denied in an unreported order by the Florida Supreme Court, and the United States Supreme Court denied certiorari. *Aldridge v. Florida*, 449 U.S. 891, 101 S.Ct. 251, 66 L.Ed.2d 118 (1980). Aldrich's motion to vacate the conviction was denied after an evidentiary hearing, and that denial was affirmed. *Aldridge v. State*, 425 So.2d 1132 (Fla.1982) (per curiam), *cert. denied*, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983). Aldrich's original petition for habeas corpus in the Florida Supreme Court was likewise denied. *Aldridge v. Wainwright*, 433 So.2d 988 (Fla. 1983) (per curiam) Petitioner's name has been spelled Aldridge throughout the state court proceedings, but Aldrich in these federal proceedings.

2. The grounds Aldrich asserted in the state court proceedings are summarized in the attached Appendix.

The state post-conviction court found after a full evidentiary hearing that counsel's failure to investigate or depose the State's key witnesses was a substantial and serious deficiency measurably below that of competent counsel. The Florida Supreme Court stated:

> The trial judge found that appointed counsel's failure to take formal depositions under the criminal rules was a substantial and serious deficiency. Although we agree that the failure to take depositions requires an inquiry, it does not necessarily follow that this conduct in itself necessitates a finding of ineffective assistance of counsel or prejudice to appellant.

Aldridge v. State, 425 So.2d 1132, 1136 (Fla.1982) (per curiam), *cert. denied*, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983). Without denying the finding that the conduct of counsel was wanting, the court went on to affirm the trial court on the ground there was no showing of the required prejudice. The federal district court, after reviewing the state record, stated:

> It cannot be questioned that appointed counsel's failure to adequately prepare Petitioner's case by taking oral depositions of the State's main witnesses, most notably witnesses Strickland and Sapp, resulted in representation at trial *not* reasonably likely to render effective assistance.

Although the State continues to argue that Aldrich has failed to meet this first prong of the *Washington* test, the record fully supports the findings of the other courts in this regard. At the evidentiary hearing conducted in the state post-conviction proceedings, Aldrich presented the testimony of three attorneys who had worked on his case: Bruce Wilkinson, Willie Gary, and Elton Schwarz. At the time of Aldrich's trial all three were working at the Public Defender's office for the Nineteenth Judicial Circuit.

Their testimony established that public defenders Wilkinson and another lawyer were assigned to represent Aldrich shortly after his September 9, 1974 arrest. Within the next two weeks, the attorneys and an investigator contacted a clerk at the hotel where Aldrich had been staying, the record keeper at the community work release center, and Jo Ann DeSamarais, a bar owner and potential alibi witness. In late October Aldrich, dissatisfied with the progress of the investigation, demanded new counsel. The court arranged for Elton Schwarz, the head Public Defender, to represent Aldrich.

Burdened by numerous other cases and administrative duties, Schwarz assigned the actual preparation of the case to Willie Gary, a legal intern in the Public Defender's office who did not become licensed to practice law until December 20, 1974. Gary, functioning as an assistant to Schwarz, also had a heavy workload. He spent time familiarizing himself with the case file, and he also went with an investigator to talk to Jo Ann DeSamarais at her bar.

Schwarz tried another capital case in December 1974, and only turned to devote attention to Aldrich's upcoming capital murder trial a week or two before it was scheduled to commence on January 6, 1975. Four days before the trial, Schwarz moved for a continuance. A hearing was held on the motion on the morning of January 6. Schwarz represented to the court that he was unprepared for trial, that he had just

completed another capital case, that no depositions of the State's witnesses had been taken, that no one from the Public Defender's office had examined the State's physical exhibits, and that he needed an additional 30 days to conduct depositions and otherwise prepare the case. Later, Schwarz testified at the post-conviction hearing that he fully expected to get the continuance as it was the first his office had requested in the case, and the trial judge in the past had been sympathetic to the workload of the Public Defender's office. Schwarz relied on the fact that in his previous experience no capital case had gone to trial in less than four months, and several other capital cases were set prior to Aldrich's. In reliance on his expectation that the continuance would be granted, Schwarz had set depositions of the State's witnesses for the following week. Defense counsel testified they were "caught sleeping" by the denial of the continuance.

After the hearing, the court denied the continuance on the ground there had already been ample time for preparation. The court did not make any finding that the case actually had been properly prepared. That same day, the three-day trial began.

At the 1981 post-conviction hearing, Schwarz testified unequivocally that he was "totally unprepared" to try Aldrich's case. Schwarz stressed that during the period immediately before Aldrich's trial, the Public Defender's office was carrying the heaviest caseload it had ever had, including numerous other capital cases. Schwarz said he never recalled "going to trial even on a misdemeanor case in the state of readiness we were in at that time." If ever again forced to go to trial in similar circumstances, Schwarz said he would either seek to withdraw as counsel or, if not allowed to withdraw, "stand mute."

Schwarz, Gary, and Wilkinson, as well as an expert witness, all testified that depositions were essential to the preparation of a capital murder case and that the failure to take depositions constituted a serious deficiency in the preparation of Aldrich's defense. There was no indication that the failure to depose any of the State's witnesses was a strategic decision on the part of the defense. *See Washington*, 466 U.S. at ——, 104 S.Ct. at 2066, 80 L.Ed.2d at 695; *Mitchell v. Kemp*, 762 F.2d 886, 889–90 (11th Cir.1985) (holding incomplete investigation of potential mitigating witnesses a strategic choice by defense counsel); *Green v. Zant*, 738 F.2d 1529, 1536 (11th Cir.), *cert. denied*, — U.S. ——, 105 S.Ct. 827, 83 L.Ed.2d 716 (1984) (defense counsel's strategic decision to "forego an extensive investigation into petitioner's background" held not ineffective).

The State argues that the real basis of this claim is the denial of the continuance, and it contends that any such challenge is barred by procedural default. The denial of a continuance was not asserted as an issue on district appeal. The basis of the ineffective assistance claim, however, is the failure to take depositions and to investigate, not the failure to obtain a continuance. The finding that the attorney's performance was deficient and that Aldrich thus met the first prong of *Washington* must be accepted by this Court.

The question, then, is whether Aldrich has shown the prejudice that is required to obtain relief for ineffective assistance of counsel. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." 466 U.S. at ——, 104 S.Ct. at 2067, 80 L.Ed.2d at 696. Aldrich must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at ——, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

[2] Initially, we reject Aldrich's suggestion that this is a case where prejudice should be presumed. Prejudice can be presumed where there is an actual or constructive denial of counsel altogether, for whatever reason. *Strickland v. Washington*, 466 U.S. at ——, 104 S.Ct. at 2067, 80

L.Ed.2d at 696; *see also United States v. Cronic*, 466 U.S. 648, —— & n. 25, 104 S.Ct. 2039, 2047 & n. 25, 80 L.Ed.2d 657, 668 & n. 25 (1984). Prejudice can also be presumed if there is a fundamental breakdown in the adversarial process. *See Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir.1985) (noting that "presumption of prejudice would be proper where counsel's representation was so deficient as to amount in every respect to no representation at all"). The record reveals, however, that although the attorneys wanted to take depositions and conduct further investigation, a good deal of work was done on the case during the four months between arraignment and trial. Counsel was appointed soon after Aldrich's arrest. The State furnished the witnesses' sworn statements to the defense in October 1974, and the Public Defender's investigator reviewed the evidence with the prosecutor. The defense contacted several witnesses and took two statements from a key alibi witness, Jo Ann DeSamarais, in September and December. Gary worked in conjunction with the investigator in preparing for the trial. Thus there was a significant amount of preparation and investigation of the case by several people prior to trial.

[3] The trial transcript reveals that Schwarz vigorously represented Aldrich at trial. Schwarz himself characterized his representation of Aldrich as follows:

> It was as effective as we could provide, taking into consideration the time constraints, the case load, and all of the other circumstances; the lack of experienced attorneys in my office.

The expert witness that Aldrich called at the evidentiary hearing on the effectiveness issue stated that "[t]hroughout the proceeding Schwarz did an admirable job in trying to try the case by the seat of his pants." Schwarz cross-examined the State's witnesses, impeached some of the most critical ones, and made effective closing arguments. Presenting Aldrich to testify to his alibi defense, Schwarz chose not to call other corroborating witnesses because the information to which he had access reflected that the potential alibi witnesses could not testify to Aldrich's whereabouts at the precise time of the crime and because by presenting such witnesses he would forego the advantage of opening and closing arguments. This is simply not the kind of case where there has been such a constructive denial of counsel or a breakdown in the adversarial process that prejudice can be presumed. To obtain relief, the defendant must show specific instances of actual prejudice.

[4] Aldrich stresses three main areas of specific prejudice: first, that identifiable areas of evidence were left undeveloped, primarily facts and witnesses relating to Aldrich's alibi and facts about the relationship between two main witnesses against Aldrich, Norman Sapp and Charles Strickland; second, that substantial impeachment of various witnesses, including Sapp, Strickland, the security guard, and the restaurant owner could have been ascertained through deposition and utilized at trial; and third, that counsel's lack of investigation led him to engage in "fishing expeditions" on cross-examination that resulted in improper evidence being addressed, including Sapp's testimony that he had been threatened and evidence of various collateral offenses committed by Aldrich as well as his prison and military AWOL records. Aldrich argues that these specific instances of prejudice, coupled with the circumstantial nature of the State's case against him, combine to create "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland v. Washington*, 466 U.S. at ——, 104 S.Ct. at 2069, 80 L.Ed.2d at 698.

In considering these allegations of prejudice, a brief review of the facts will be helpful. At 12:05 A.M. on Tuesday, September 3, 1974, Robert Ward telephoned his wife from his father-in-law's restaurant in Fort Pierce, where he worked, to tell her he had finished closing up and was on his way home. At 12:14 A.M., sheriff's deputies responded to the restaurant's burglar alarm. When they arrived five minutes

later, they discovered Ward's body lying outside the locked back door of the restaurant next to his car. He had been killed by one or more shotgun blasts to the head. Thus the murder had taken place between 12:05 and 12:20 A.M.

The combination safe inside the restaurant office was open and empty, and the receipts of the night, estimated by the owner as between $600 and $900, were missing. Ward's keys were on a desk in the office. The burglar alarm switch to the office door was set, but the one on the back door was not.

While law enforcement officers investigated the crime scene, a deputy noticed a white Chrysler driving slowly along the highway in front of the restaurant about 2:00 A.M. His suspicions aroused, the deputy pursued and stopped the car, which was driven by petitioner Aldrich. Aldrich had between $500 and $600 in cash stuffed into his four pockets, including many one dollar bills. Officers then accompanied Aldrich back to the hotel room in which he had been staying since his release from prison on August 27, 1974. There, Aldrich showed the officers a receipt for $558.58 that he had received from the Department of Corrections upon his release. He also produced a receipt for $200 he had paid for his car on August 27, 1974.

The authorities continued their investigation, eventually discovering several witnesses whose stories tended to implicate Aldrich. The murder weapon, which had been broken apart, was recovered from two local waterways. On September 9, 1974, Aldrich was arrested, and on October 17, 1974 he was indicted for the murder of Robert Ward.

At the January 1975 trial, the State presented a number of witnesses whose testimony established a strong circumstantial case against Aldrich. A security guard who was working the night shift at a business located near the restaurant where the killing occurred testified that Aldrich's car careened out of a trucking company lot next door and nearly ran over her at 1:00 A.M. on the night of the murder. The restaurant owner testified that he had employed Aldrich at the restaurant as a dishwasher earlier in 1974 while Aldrich was in a prison work release program but that he had fired Aldrich for "exceeding his authority." A cook at the restaurant testified that Aldrich had told her he intended to come back and rob the restaurant when he obtained his release from prison, and that he knew how to shut off the burglar alarm. The cook also stated that Ward, the murder victim, had befriended Aldrich while he worked at the restaurant.

Some of the most damaging testimony came from James Norman Sapp and Charles Strickland, both of whom had met Aldrich in prison prior to the murder. Sapp said Aldrich had told him he intended to rob the restaurant because he had received inadequate pay while employed there. According to Sapp, Aldrich had told him he had purposefully set off the burglar alarm while working at the restaurant to check the police response time. Sapp said he gave his story to the police after receiving threatening calls a few days after the murder.

Strickland testified that Aldrich had called him at 6:40 P.M. on September 2 and asked to borrow a gun to go deer hunting. At 7:30 P.M., Strickland met Aldrich at a parking lot in Fort Pierce and delivered a shotgun and five shells. Later that evening, Strickland drove Lillie King to the hospital between the hours of midnight and 1:00 A.M. After returning home, Strickland got a call about 1:30 A.M. from Aldrich, saying he had had to kill a man. The next day, Aldrich called Strickland and asked him to help recover the shotgun from the trucking company lot near the restaurant, at which time Aldrich told Strickland he had killed a man at the restaurant because the man had tried to remove his mask. Strickland testified that after retrieving the gun he cleaned it, broke it down, and threw it into two separate ditches. Later, however, he led police to where he had disposed of the gun.

Strickland's testimony was somewhat confirmed by other witnesses. Two young

girls, 9 and 14, who lived in the house where Strickland was staying testified they accompanied Strickland to a parking lot on September 2 and saw him deliver the gun to a man whom Strickland later told them was Aldrich. Lillie King testified that Strickland drove her to the hospital to meet her boyfriend at 11:50 P.M. on September 2 and dropped her off at her boyfriend's car at 12:40 A.M. on September 3.

Aldrich was the sole defense witness. He asserted an alibi defense, claiming absolute noninvolvement in the crime. According to his testimony, he went fishing until 10:30 or 11:00 P.M. the night of September 2. He then went to a bar until 1:30 or 2:00 A.M. He claimed that when stopped by the police in front of the restaurant at 2:00 A.M., he was on his way to visit a woman from whom he hoped to rent a room.

Aldrich correctly asserts that his allegations of prejudice must be considered in light of this factual background. First, with respect to the allegation that undiscovered evidence was not presented, there has never been any evidence proffered in either the state or the federal post-conviction proceedings that could have been discovered and presented at the trial. Other than the speculation of the attorneys, no witnesses were called, no affidavits offered and no statements presented at the post-conviction hearing to indicate anyone would testify to anything that would have clearly corroborated Aldrich's alibi or supported Schwarz's speculation that "Strickland and Sapp are the ones that were principally involved." In its review of the case on appeal from post-conviction proceedings, the Florida Supreme Court noted this absence when it stated "[a]ppellant has made no attempt whatever to present any evidence to indicate what information would have been elicited in taking the depositions which would have affected the outcome of his trial." *Aldridge v. State*, 425 So.2d at 1136. Speculation is insufficient to carry the burden of a habeas corpus petitioner as to what evidence could have been revealed by further investigation. Although counsel may have been pressed for time in January 1974, the intervening decade should have revealed whatever evidence it is contended should have been discovered prior to trial.

Aldrich asserts that "perhaps the single most critical area of the case that went wholly unexplored" is the relationship between Strickland and Norman Sapp and Strickland's potential motive for committing the robbery. Strickland was living with Norman Sapp's brother, Leonard, and Leonard's wife and children. These living arrangements had been made by Norman after he and Strickland were released from prison. Before the trial, Aldrich told his counsel that Strickland was having an affair with Leonard's wife. Strickland allegedly told Aldrich that he wanted to run off to North Carolina with Leonard's wife and therefore needed money. Strickland also allegedly asked Aldrich to commit a robbery for him at a store where Strickland knew the clerk, and when Aldrich refused, this allegedly precipitated hard feelings between Strickland and Aldrich.

This evidence is argued to show that Strickland had a motive for committing the robbery himself. This is insufficient to show it would have created "a reasonable probability" of reasonable doubt respecting guilt. There is nothing shown that would impugn the testimony of Lillie King that Strickland was with her at the time of the murder.

[5] Second, the failure to interview or take the depositions of the State's witnesses for impeachment purposes is not prejudicial *per se*. *See McCleskey v. Kemp*, 753 F.2d 877, 900 (11th Cir.1985) (*en banc*) (holding no prejudice shown where attorney failed to interview two of State's witnesses and potential defense witnesses); *Boykins v. Wainwright*, 737 F.2d 1539, 1543 (11th Cir.1984) (holding no prejudice shown where attorney failed to interview prosecution's expert witnesses), *cert. denied*, — U.S. —, 105 S.Ct. 1775, 84 L.Ed.2d 834 (1985); *Solomon v. Kemp*, 735 F.2d 395, 402 (11th Cir.1984) (holding no prejudice shown where attorney failed to talk to all of the State's witnesses and did

not seek funds for an investigator), *cert. denied*, — U.S. —, 105 S.Ct. 940, 83 L.Ed.2d 952 (1985). Discovery depositions in criminal cases were not authorized by rule in Florida until 1968. *In re Florida Rules of Criminal Procedure*, 196 So.2d 124 (Fla.1967) (per curiam). They are not authorized by rule in federal courts.

Aldrich has not identified any specific information that would have been revealed by depositions or interrogatories and would have added to the impeachment of the State's witnesses. On cross-examination at the post-conviction hearing, both attorneys who represented Aldrich at trial were unable to point to any fact learned at trial, or later, that might have been discovered by deposition, and stated that they could not think of anything that surprised them at trial. Both Sapp and Strickland were exposed to substantial impeachment by defense counsel. The jury was aware that both witnesses had criminal records. Counsel established that Strickland had previously lied under oath, that he had violated his parole, and that he owned the murder weapon. Given this substantial impeachment of the testimony and credibility of Strickland, who furnished the only direct evidence that Aldrich committed the murder, the collateral matters Aldrich now asserts should have been explored do not create a reasonable probability that the jury would have given less credence to Strickland's testimony. Similarly, counsel's suggestion that Joyce Marshall and Al DiVagno could have been "pinned down" by deposition and more easily tested by cross-examination at trial is speculative. In any event, counsel had available the means to question Marshall's testimony that Aldrich's car drove by at 1:00 A.M., since her sworn statement showed that she saw the car between 12:00 and 12:30 A.M.

Finally, Aldrich has not established that he was prejudiced by the admission of evidence which he now argues his attorney should have sought to exclude. *See Messer v. Kemp*, 760 F.2d 1080, 1090 (11th Cir. 1985). The link between these alleged failures of counsel to make objection at trial and the failure to conduct adequate pretrial investigation is too tenuous to require a reversal of the finding of no prejudice.

Given Aldrich's failure to demonstrate prejudice under the standards of *Strickland v. Washington*, the district court properly denied habeas corpus relief on this ground.

II. SECOND DEGREE FELONY MURDER CHARGE

Aldrich claims that under *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), and *Hopper v. Evans*, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982), the trial judge violated Aldrich's due process rights when he did not instruct the jury on the lesser included offense of second degree felony murder. At the outset, it strains credulity that Aldrich would raise such a claim now and, moreover, that he would repeatedly characterize the fact that the trial judge did not deliver such a charge as a "refusal." A review of the trial transcript reveals not only that Aldrich never requested the second degree felony murder instruction at trial, but that he and his attorney both objected vociferously but unsuccessfully to the trial judge's earnest attempts to instruct the jury on any lesser included offenses.

At the close of the evidence, Aldrich submitted a motion to the trial judge that included the following specific request:

> That the Court charge the jury only on the offense of murder in the first degree as charged in the amended indictment filed herein and not include any charge as to any lesser included offense other than that of not guilty.

When questioned by the trial judge, Aldrich explained that he submitted the motion because he did not want to be convicted of an offense that would send him back to prison. The court initially stated an intention to grant the motion, but then after additional argument the following colloquy took place:

> THE COURT: Excuse me for interrupting you [spoken to defense counsel]. I think the simplest thing to do, and the thing for me to do is to deny the defendant's request that the matter be submitted solely on murder in the first degree and not guilty, and require verdicts in second and third degree and manslaughter.
>
> MR. SCHWARZ [defense counsel]: Defendant objects to that, Your Honor.
>
> THE COURT: Well, you certainly can.
>
> MR. SCHWARZ: I object to the reading of any definition of degrees of homicide other than murder in the first degree.

The court proceeded to instruct the jury on the lesser degrees of murder, but it gave no instruction on second degree felony murder.

Even overlooking the fact that Aldrich was opposed to any instructions on lesser included offenses, his claim lacks merit. In *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the Court held unconstitutional an Alabama statute prohibiting a trial judge from giving a lesser included non-capital offense charge in a capital case where the defendant had testified that he participated in the robbery but, casting the blame on his accomplice, consistently denied killing the robbery victim or intending his death. In *Hopper v. Evans*, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982), the Supreme Court held there was no due process violation in failing to give a lesser included offense instruction in a capital case where there was no evidentiary basis to support a finding of such offense. *See also Spaziano v. Florida*, — U.S. —, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Florida law prohibits instructions on lesser included offenses where there is no evidence to support a conviction on the lesser included offense. *See Hitchcock v. Wainwright*, 745 F.2d 1332, 1341 (11th Cir.1984), *on pet. for reh'g and reh'g en banc*, 745 F.2d 1348 (11th Cir.1985).

[6] Under Florida law, "liability for second degree felony murder occurs when the individual perpetrates the underlying felony as an accessory before the fact but does not personally engage in it." *Adams v. State*, 341 So.2d 765, 768 (Fla.1976) (per curiam), *cert. denied*, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 158 (1977). Aldrich suggests that the jury could have disbelieved both his own alibi testimony claiming no involvement whatsoever in the crime and the testimony of Strickland directly implicating Aldrich as the triggerman and then, using the testimony of other witnesses, constructed its own theory that Aldrich was somehow an accessory before the fact. Neither Aldrich nor his counsel in any way suggested such a theory to the jury. The evidence at trial was insufficient to show facts necessary for a second degree felony murder conviction. No such instruction was constitutionally required.

III. FAILURE TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES

[7] Aldrich's final contention is that the only mitigating factor present in his case, residual doubt about his guilt, was not considered by the trial judge or jury at the capital sentencing proceeding. This point was not asserted at trial or on appeal and is barred by procedural default under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), there being no showing of cause and prejudice, as held by the district court.

Aldrich expressly requested at sentencing that no mitigating circumstances be presented to the jury, stating he preferred the death penalty to spending more time in prison. On direct appeal, the Florida Supreme Court stated "the trial court found no mitigating circumstances and Aldridge does not contest that finding on appeal." *Aldridge v. State*, 351 So.2d 942, 944 n. 4 (Fla.1977) (per curiam), *cert. denied*, 439 U.S. 882, 99 S.Ct. 220, 58 L.Ed.2d 194 (1978). Issues that could be, but are not, asserted on an appeal of a criminal conviction are foreclosed from collateral attack in state court, and therefore barred from consideration in federal court. *Ford v. Strickland*, 696 F.2d 804, 816 (11th Cir.) (*en banc*) (per curiam), *cert. denied*, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983).

When Aldrich attempted to raise the claim for the first time in his motion for post-conviction relief, the trial court denied relief on the basis that the grounds raised "have already been presented or should have been presented in his direct appeal." The Florida Supreme Court affirmed the denial of relief except with regard to the ineffective assistance of counsel claim and remanded the case for an evidentiary hearing on that issue. *Aldridge v. State*, 402 So.2d 607 (Fla.1981); *see also Aldridge v. State*, 425 So.2d 1132, 1136 (Fla.1982), *cert. denied*, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983). Thus, the state courts have uniformly held Aldridge's mitigating circumstances claim to be procedurally barred. The district court correctly held that there was a procedural default under *Wainwright v. Sykes*.

In a footnote to his brief on appeal, Aldrich now argues the district court should not have relied on a procedural bar because the State failed to assert that defense in response to Aldrich's federal habeas corpus petition. We need not decide whether such state action would make the district court's decision erroneous. Aldrich raised in his federal petition as a single ground that a nonstatutory mitigating factor was not considered and that the trial court's inquiry into Aldrich's waiver of the presentation of mitigating evidence was constitutionally inadequate. The State responded that no state court had refused to consider any mitigating factor and that the waiver issue was barred by procedural default. A fair reading of the State's response compels a conclusion that the State continued to assert the procedural default defense in federal court.

The procedural default on this issue precludes review on the merits unless cause and prejudice would excuse Aldrich's default. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 594 (1977). Aldrich can show no cause that would excuse the default. Like the petitioner in *Shriner v. Wainwright*, 715 F.2d 1452, 1457 (11th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 1328, 79 L.Ed.2d 723 (1984), Aldrich asked the court to allow him to waive the sentencing proceeding and sentence him to death because he did not want to spend more time in prison. Although the court denied the motion, Aldrich's lawyer presented no mitigating circumstances, and apparently in accordance with his client's wishes made the following argument to the jury:

> As I indicated, ladies and gentlemen, my client has not asked for me to plead for an advisory opinion for life imprisonment. Under the statute, as Mr. Stone has made out, on a capital offense such as this, a life sentence requires the serving of—a mandatory serving of a minimum of twenty-five calendar years before even being eligible for parole. Mr. Aldrich has spent ten years in the state prison. He has no desire to spend the rest of his life there. He has, therefore, asked me and I will accede to his wishes and not request that there be mitigating circumstances presented.

The jury returned a recommendation of death, and the court, after affording another opportunity for argument on Aldrich's behalf, imposed the death sentence. No argument was ever made that a nonmitigating factor of whimsical doubt should be considered, although surely the jury and judge were well aware that the case against Aldrich was largely circumstantial.

The failure to establish any cause for failure to raise the issue at trial or on appeal forecloses further consideration of this claim. The district court's denial of Aldrich's petition for habeas corpus is

AFFIRMED.

APPENDIX

In Aldrich's direct appeal of his conviction, he argued for reversal on the following points:

1. Introduction of an objectionable and inflammatory photograph of the victim.
2. Direction to the jury that it must find an unanimous verdict, allegedly depriving Aldrich of his right to a "hung" jury.

APPENDIX—Continued

3. Reading of instructions to the jury which had the net effect of barring a conviction for second degree felony murder.
4. Aldrich also asserted the unconstitutionality of the death penalty statute and alleged error by the trial judge in describing the crime as heinous and atrocious in the judge's written findings of aggravating and mitigating circumstances.

Aldridge v. State, 351 So.2d 942 (Fla.1977) (per curiam), *cert. denied*, 439 U.S. 882 [99 S.Ct. 220, 58 L.Ed.2d 194] (1978).

In November 1979 Aldrich filed a Rule 3.850 motion in the trial court. Aldrich alleged the execution of the death sentence would deprive him of due process of law and constitute cruel and unusual punishment for the following reasons:

1. The sentencing judge allowed the jury to consider, and the sentencing judge expressly relied upon aggravating factors which are not encompassed by the state statute.
2. The sentencing judge's instructions in the penalty phase constituted a direct and prejudicial comment on the evidence.
3. Aldrich's sentence of death was upheld on appeal on the basis of aggravating circumstances that were not found by the sentencing judge.
4. The Florida Supreme Court failed to remand for resentencing where mitigating circumstances were found by the sentencing judge and the only aggravating factor found by the sentencing judge was not sustained on appeal.
5. The sole aggravating circumstance found by the sentencing judge in support of Aldrich's death sentence was not sustained on appeal and is not supported by the evidence and the ruling case law.
6. The sentencing judge and the Florida Supreme Court failed to weigh the nonstatutory mitigating factor of doubt about Aldrich's guilt.
7. The sentencing judge imposed the death sentence immediately, and without reflection, after the jury returned its advisory sentencing verdict.
8. The sentencing judge failed to inquire of Aldrich regarding the purported waiver of the fundamental constitutional right to present evidence and argument in mitigation, with the result that there is no basis in the record for determining whether such a purported waiver was voluntarily and intelligently made.
9. No aggravating circumstances were alleged in the indictment in the present case and no notice of aggravating circumstances that the State intended to charge was otherwise given, resulting in the denial of the fundamental due process requirement of notice of charges and lack of jurisdiction for the sentencing court to impose the death sentence.
10. The Florida death penalty statute is unconstitutional on its face and as applied because no standard of proof is required for the overall weighing process in determining whether the death sentence is appropriate; and no standard for weighing the aggravating and mitigating circumstances was employed in this case.
11. The aggravating circumstances are applied in Florida in an inconsistent, overboard, arbitrary and vague manner.
12. Execution by electrocution is a cruel and unusual punishment.
13. The death penalty is imposed in Florida in an arbitrary, capricious, and discriminatory manner based upon race, geography, poverty, sex and other arbitrary factors.
14. The circumstantial evidence in the present case was insufficient to sustain a verdict of guilt and is wholly insufficient to support the taking of a human life.

APPENDIX—Continued

Aldrich also alleged he was denied the effective assistance of counsel in both the guilt and sentencing phases, asserting:

1. Counsel was unprepared or prevented from being prepared for trial and to render effective assistance.
2. There were strong conflicts between the office of the Public Defender and Aldrich which precluded an adequate relationship.
3. Counsel failed to adequately consult with Aldrich and investigate evidence and/or witnesses suggested by Aldrich.
4. Aldrich's primary attorney was inexperienced in handling capital cases.
5. Counsel emphasized and made a feature of Aldrich's criminal record during the trial.
6. Counsel failed to produce a key alibi witness until after the trial.
7. Counsel failed to object to introduction of evidence obviously unrelated to any statutory aggravating circumstances and to jury instructions wherein the court commented to the jury on the weight of the evidence.
8. Counsel failed to adequately consult with Aldrich regarding the purported waiver of the fundamental right to present evidence and argument in mitigation of the death sentence.
9. Appellate counsel failed to raise various points although there was "an arguable chance of success with regard to these contentions."

On June 18, 1981, the trial court denied Aldrich's Rule 3.850 motion without conducting an evidentiary hearing. On July 7, 1981, the Florida Supreme Court entered an order holding that an evidentiary hearing was required on the issue of effectiveness of counsel but affirming as to the other allegations. *Aldridge v. State*, 402 So.2d 607 (Fla.1981).

After the evidentiary hearing, the trial court denied Aldrich's motion to vacate. The Florida Supreme Court affirmed. *Aldridge v. State*, 425 So.2d 1132 (Fla.1982) (per curiam), *cert. denied*, 461 U.S. 939 [103 S.Ct. 2111, 77 L.Ed.2d 315] (1983). In its opinion, the Florida Supreme Court addressed the following arguments:

1. That Aldrich had been deprived of effective assistance of counsel by the assignment of a nonlawyer to represent him during pretrial preparations.
2. The refusal to appoint an attorney from outside the public defender's office.
3. Counsel's failure to raise on appeal the issue of the denial of the public defender's motion for a continuance.
4. Specific acts and omissions on the part of appointed counsel, particularly the failure to depose witnesses.

Finally, reviewing Aldrich's petition for a writ of habeas corpus, the Florida Supreme Court considered four grounds raised by Aldrich:

1. The Florida Supreme Court unconstitutionally applied the principle of law established in *Elledge v. State*, 346 So.2d 998 (Fla.1977), which requires the court when it finds one or more aggravating circumstances improper to remand unless there are no mitigating circumstances.
2. The Florida standard jury instructions which direct the trial judge to instruct the jury on all lesser degrees of homicide render the capital sentencing scheme unconstitutional.
3. The Florida standard jury instructions which present to the jury in the penalty phase all of the statutory aggravating factors are erroneous and create fundamental error.
4. The standard jury instruction which directs how the jury should arrive at the recommended penalty is written in a manner that makes Florida's capital punishment scheme violative of the Eighth and Fourteenth Amendments.

The Florida Supreme Court rejected all of these grounds. *Aldridge v. Wainwright*, 433 So.2d 988 (Fla.1983) (per curiam).

JOHNSON, Circuit Judge, dissenting:

I agree with the majority's conclusion that the failure of petitioner's counsel to take any depositions or to conduct a meaningful pretrial investigation constituted errors so serious that counsel was "not functioning as the counsel guaranteed by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, I conclude that because petitioner was prejudiced by his counsel's lack of preparation and trial errors, petitioner was denied effective assistance of counsel.

To demonstrate "prejudice" under *Strickland v. Washington*, the petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*, 104 S.Ct. at 2068. In determining whether the petitioner was prejudiced by counsel's errors, a reviewing court must consider "the totality of the evidence before the judge or jury," and that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 2069.

Petitioner was convicted on the basis of evidence that was far from strong. No physical evidence implicating Aldrich was recovered at the scene of the killing. While in custody, Aldrich made no statements resembling a confession. The only direct evidence implicating Aldrich was testimony from a convicted felon who had violated the terms of his parole and lied to police investigators, and who was the other most likely suspect in the crime. It is in light of this record that counsel's errors take on their full significance.

This case required the jury to unravel and choose between two conflicting versions of a murder. The jury heard testimony from several people who said that Aldrich had told them of his intent to rob Al DiVagno's restaurant, where the murder victim worked. The prosecution's most important testimony, however, was provided by Charles Strickland, who had been a roommate of Aldrich in prison. Strickland testified that Aldrich borrowed a shotgun from him on the evening of September 2, 1974, and that Aldrich said he wanted to use the gun for deer hunting. According to Strickland, Aldrich later asked him for help in retrieving the weapon. Strickland claimed Aldrich told him that, in the course of the robbery, Aldrich had to shoot Robert Ward, an employee of the restaurant, because Ward "tried to pull off his mask." A security guard who worked nearby testified that she was almost run over by Aldrich's vehicle at about 1:00 a.m. that night. Another witness, who lived in the same house as Strickland, testified that Strickland was with her from 11:50 p.m. on September 2 to 12:40 a.m. on September 3, during which time the murder occurred.

Aldrich testified that, on the night in question, he was fishing until approximately 10:30 or 11:00 p.m., and that he then went to JoAnn's Quarter Bar, where he stayed until after 1:30 a.m. At this time, he left the bar for the home of a woman from whom he had just agreed to rent a room. He testified that he needed to finalize the rental, and that the woman had said that she often stayed awake until 3:00 or 4:00 a.m. On the way to this woman's home, Aldrich drove slowly by DiVagno's restaurant, looking for the right road.

Aldrich testified that, shortly thereafter, he was stopped by police who were investigating an incident at DiVagno's restaurant. During questioning, he showed the police $500-$600 he had in his possession and explained that he had saved the money from payments for work received from the prison road camp. Aldrich testified that he subsequently went with police to his apartment, where he permitted them to search his room and belongings and showed them the payment voucher for the money from the correctional center. Aldrich also testified that, during the period just preceding the robbery of the restaurant, Strickland had asked his help in robbing a grocery store at the store's closing time. Aldrich refused, stating that it had taken a long time to get out of prison and that he was

trying to stay out. Aldrich testified that this response started an argument between the two men.

By his own admission, Aldrich's counsel, Public Defender Elton Schwarz, went to trial "totally unprepared." He had no knowledge of the State's case or the evidence the State was likely to present at trial. He had failed to depose any of the State's witnesses, and had undertaken only minimal investigation: only three individuals had even been approached. Schwarz barely had any knowledge of Aldrich's case: his office had hardly begun to review the papers in the case until two weeks before the trial. His investigator had contacted only one person with information relating to Aldrich's alibi defense. Four days before the trial, Schwarz moved for a continuance. At the hearing on the continuance motion, conducted on the day the trial was to begin, Schwarz advised the court: "This case is not prepared. We are not in a position to provide competent legal representation." Schwarz testified at the habeas corpus hearing that he believed the continuance would be granted, and he had scheduled depositions of the State's witnesses for the following week. The court denied the motion for continuance. Schwarz later stated that "I don't recall going to trial, even on a misdemeanor case, in the state of readiness that we were in at that time."

At the trial, the jury had the opportunity to hear the State's version of what happened but, in effect, never heard Aldrich's side of the case. Because his counsel had not spoken with the State's witnesses, Aldrich did not have the benefit of effective cross-examination that is critical to the fact-finding process. Also, because of his inadequate preparation, Aldrich's counsel failed to present evidence that would have supported Aldrich's alibi.

Although there was testimony corroborating Strickland's account, if Strickland's testimony had been anticipated, counsel could have brought out information that would have strongly impeached Strickland's credibility. Strickland had told Aldrich that he was planning to leave for North Carolina with the wife of Leonard Sapp, the brother of Aldrich's former roommate, Norman Sapp, and that he needed money in order to make the move. It was for this purpose that he asked Aldrich to help him rob a grocery store. Strickland was apparently angered not only by Aldrich's refusal to help him in this effort, but also by Aldrich's failure to approve of Strickland's relationship with Sapp's wife. Strickland thus had a motive both to commit the crime himself and to place the blame on Aldrich, which motive Aldrich's counsel did not attempt to develop at trial.

Several other facts tended to impeach Strickland's credibility. Strickland was on parole from prison, and had been granted immunity for his testimony. He owned the murder weapon, in violation of the terms of his parole. Also, when the prosecutor first spoke with Strickland after the crime, Strickland falsely told him that his gun had been stolen. Strickland later changed this story and led the police to the place where he had disposed of the gun. If the defense counsel had deposed Strickland before he testified, counsel could have been free at trial to fully exploit Strickland's vulnerability. However, because Schwarz did not know what answers to expect from Strickland, he could not risk asking many of the questions that might have broken down Strickland's credibility and caused the jury to disbelieve his testimony.

Strickland was not the only witness whose testimony might have been shaken by effective cross-examination. Norman Sapp, who testified that Aldrich had said he intended to rob the restaurant, was not investigated or deposed prior to the trial. The defense did not even have a statement from Sapp—it knew nothing about him. Thus, his testimony could not be effectively challenged. The security guard who testified that she saw Aldrich's car also could not be effectively challenged. Although she testified that she saw what looked like Aldrich's car driving through her plant at exactly 1:00 a.m. on the night of the offense, a summary presented at the preliminary hearing indicated that she would testify that the time she saw the car was between 12:00 and 12:30 a.m. However, without having first deposed her, the defense could not know where to find inconsistencies in her testimony.

As a result of its inadequate investigation, the defense also failed to present evidence corroborating Aldrich's claim that he was in a bar at the time of the homicide. Although the owner of the bar made a post-trial affidavit saying that Aldrich was in her bar at the time of the crime, she was not called to testify.

Because he did not know what to expect from the State's witnesses, Schwarz's cross-examinations were largely fishing expeditions that did his client more harm than good. His cross-examination of Norman Sapp unexpectedly brought out the fact that Sapp had received threatening phone calls after the offense. Had counsel known what to expect, he could have prevented this inadmissible and possibly prejudicial testimony. Through cross-examination of another witness, Schwarz inadvertently brought out Aldrich's entire criminal record in specific detail, which testimony also was inadmissible.

Counsel's lack of preparation might also have harmed Aldrich at the penalty phase. The State presented testimony by a police investigator that the owner of JoAnn's Quarter Bar had told police that Aldrich had not been in the bar on the night of the homicide. The defense did not call the bar owner to rebut this hearsay statement. In fact, the defense presented no argument or evidence whatsoever in mitigation of punishment.

This is not the kind of case where, no matter how counsel performed, the outcome would undoubtedly have been the same. There was no one piece of conclusive evidence, such as a voluntary confession, that would have precluded an effective defense. Nor was there an overwhelming amount of evidence from which a jury could draw but one conclusion. Rather, the outcome depended on which of two stories the jury believed, where there were substantial reasons to disbelieve either one.

The majority cannot justify its position as one of deference to the jury, because the issue is not whether the jury, based on a review of all the facts, came to the right conclusion. The issue here is whether the jury was improperly denied the opportunity to have and consider the facts. Because of his counsel's lack of preparation, Aldrich's story has never really been presented before a jury. If Aldrich had been represented by competent counsel, there is in my judgment a reasonable probability that a jury would have believed his version and found him innocent.

Accordingly, I dissent.

SPENCER D MERCER
CLERK

United States Court of Appeals
ELEVENTH CIRCUIT
OFFICE OF THE CLERK
56 FORSYTH STREET N.W.
ATLANTA GEORGIA 30303 3147

IN REPLY NO GIVE NUMBER OF CASE AND NAMES OF PARTIES

December 27, 1985

RECEIVED

DEC 30 1985

PUBLIC DEFENDER
APPELLATE DIVISION
15th JUDICIAL CIRCUIT

TO ALL PARTIES AND COUNSEL LISTED BELOW:

NO. 84-5523
ALDRICH v. WAINWRIGHT
District Court No. 83-8315-Civ-JE

This is to advise that an order has this day been entered denying the petition( ) for rehearing.

[/] The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, FRAP; Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

[X] No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, FRAP; Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

See Rule 41, FRAP and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

SPENCER D. MERCER, Clerk

BY Deputy Clerk

CC: Mr. Richard H. Burr, II
Mr. Craig S. Barnard
Ms. Joy Shearer, AAG-W. Palm Beach

REHG-3

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-5523

LEVIS LEON ALDRICH,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 19, 1985, 11 Cir., 198_, _____F.2d_____).
( )

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Paul H. Roney
United States Circuit Judge

REHG-6
(Rev. 6/82)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-8315-Civ-JE

LEVIS LEON ALDRICH, :

Petitioner, :

vs. : ORDER

LOUIE L. WAINWRIGHT, etc., :

Respondent. :

DEC 2 1983

THIS CAUSE is before the Court on the Petition for Writ of Habeas Corpus, filed by Petitioner, Levis Leon Aldrich on June 16, 1983. Aldrich is in state custody under sentence of death. On June 20, 1983 this Court entered a stay of Aldrich's execution after finding that the petition stated claims under the United States Constitution. Oral argument on the petition was held on June 29, 1983, and counsel was subsequently directed to file additional briefs assessing the impact of the large number of Eleventh Circuit and Supreme Court cases decided after the filing of the instant petition on the issues raised therein.

The Court has reviewed the lengthy record in this cause, and has considered the submissions of counsel. Upon such consideration the Court enters the following Order, which discusses each issue raised by Aldrich in the sequence presented in the petition:

A. Aldrich contends first that he was denied effective assistance of counsel because of appointed counsel's substantial inability and failure to prepare for trial.

After an evidentiary hearing on this issue held on Aldrich's motion to vacate his sentence, the state trial court held that trial counsel's failure to take pretrial depositions upon oral examinations of the State's key witnesses was a substantial and serious deficiency measurably below that of competent counsel. Such deficiency, the trial court found, did not however effect the outcome of the trial, creating the degree of prejudice required under state law to provide relief from the sentence.

Under the more liberal standard controlling in this circuit, this Court must reach the same result. It cannot be questioned that appointed counsel's failure to adequately prepare Petitioner's case by taking oral depositions of the State's main witnesses, most notably witnesses Strickland and Sapp, resulted in representation at trial not reasonably likely to render effective assistance. See United States v. Phillips, 664 F.2d 971, 1040 (11th Cir. 1981), cert. denied, —— U.S.—— , 103 S.Ct. 208 (1983). The Court must conclude, however, that Aldrich has failed to meet his burden on the second prong of the Sixth Amendment test, namely that counsel's representation at trial, even if ineffective, "created not only a possibility of prejudice, but that '[it] worked to his actual and substantial disadvantage.'" Washington v. Strickland, 693 F.2d 1243, 1258 (5th Cir. Unit B 1982) (en banc), quoting United States v. Frady, 456 U.S. 152 (1982). Because the Court is not convinced that Aldrich's situation at trial would have been materially improved had counsel taken those steps that Petitioner asserts should have

been taken, the petition must be denied on this ground. See Weidner v. Wainwright, 708 F.2d 614 (11th Cir. 1983).

B. Aldrich next argues that he was denied effective assistance of counsel as a result of his irreconcilable conflict with attorneys in the public defender's office. This contention fails to state a claim upon which relief may be granted, and must accordingly be denied. See Morris v. Slappy, —— U.S. ——, 75 L.Ed.2d 610 (1983).

C. The next ground raised is that Aldrich was denied effective assistance at both phases of his trial. For the reasons discussed in section A, above, the petition must be denied on this ground.

D. Aldrich argues that his due process rights were violated by the second degree murder instruction given to the jury at trial because it effectively barred a conviction for second degree felony murder, thus enhancing the risk of an unwarranted conviction for first degree murder. After a careful review of the trial record the Court concludes that there was insufficient evidence to support a finding by a reasonable juror that Aldrich was an accessory before the fact to the robbery and murder. Therefore, even if the second degree murder instruction was erroneous because it had the net effect of barring a conviction for second degree felony murder, see Aldridge v. State, 351 So.2d 942, 944 (Fla. 1977), such error was not of constitutional proportion because it did not render the entire trial fundamentally unfair. See Carrizales v. Wainwright, 699 F.2d 1053, 1055 (11th Cir. 1983). The petition

fails on this ground.

E. Aldrich next argues that his sentence was imposed arbitrarily and capriciously because the aggravating circumstances considered failed to channel sentencing discretion as required by the Eighth and Fourteenth Amendments. Because Aldrich failed to raise this issue on direct appeal, and has not established cause and prejudice for such failure, the claim appears to be barred by the procedural default rule of Wainwright v. Sykes, 433 U.S. 72 (1977). In any event, any merit this claim might have had when the petition was filed has been extinguished by the recent Supreme Court decisions in Zant v. Stephens, —— U.S. ——, 77 L.Ed.2d 235 (1983), and Barclay v. Florida, —— U.S. ——, 77 L.Ed.2d 1134 (1983).

F. Aldrich waived his right to present mitigating evidence to the jury at the sentencing phase of his trial. He now argues that such waiver was inadequate, and that his sentence was imposed and affirmed in proceedings which ignored as a matter of law the only mitigating circumstance in evidence, alleged incertitude of Petitioner's guilt. This claim is without merit, and is in any event barred by the Wainwright v. Sykes rule.

G. Aldrich next contends that he was denied due process and subjected to cruel and unusual punishment by procedural and substantive errors committed by the Florida Supreme Court in its review of Petitioner's sentence. Basically Aldrich in this claim argues that the Florida Supreme Court found aggravating factors in support of the sentence not found by

the trial judge. The record is clear that the trial court explicitly found the two aggravating circumstances identified by the Supreme Court, although erroneously including them in the incorrect determination that Aldrich's crime was heineous, attrocious and cruel. The petition must therefore be denied on this ground. See Barclay v. Florida, supra.

H. Aldrich alleges that the jury's function was curtailed at the sentencing phase of trial by the court's instructions, resulting in a denial of due process. Prior to listing for the jury the statutory aggravating factors, the trial judge stated:

> The aggravating factors which you may consider are limited to such of the following as may have been established by the evidence. You will find that some of these apply. You will find that some of them do not, but these are the matters, the aggravating circumstances which you may consider if they be established by the evidence.

Trial Transcript at 747 (emphasis added). Petitioner argues that such instruction improperly directed the jury to find aggravating circumstances in this case.

This claim too is apparently barred by Wainwright v. Sykes. Moreover, it is clear that any error in the portion of the sentencing instruction quoted above, viewed in the context of the entire charge, was harmless. See Grizzell v. Wainwright, 692 F.2d 692 F.2d 722 (11th Cir. 1982).

I. Aldrich next argues that the Florida Supreme Court failed to conduct a proportionality review of his sentence, depriving him of due process of law. Although Petitioner's sentence was not expressly compared with those handed out upon conviction for similar crimes, the Florida Supreme Court examined the trial record and concluded that

"the death penalty was warranted." Aldridge v. State, 351 So.2d at 944. The United States Supreme Court has yet to decide whether some form of proportionality review is constitutionally required in every case where death is imposed. It is clear, however, that the Florida Supreme Court conducts such review in all cases. See Barclay v. Florida, —— U.S. ——, 77 L.Ed.2d at 1149; Proffit v. Florida, 428 U.S. 242, 259 (1976); Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981) ("The second aspect of our review process is to insure relative proportionality among death sentences which have been approved statewide.")

Therefore, whether constitutionally required or not, this Court must conclusively presume that a proportionality review was conducted by the state Supreme Court in this case, and must deny the petition on this ground.

J. Petitioner next raises what has become known in this circuit as the Brown issue -- namely that the Florida Supreme Court improperly considered nonrecord information in conducting its statutory review of Aldrich's sentence. Consideration by this Court of the Brown issue has been foreclosed by the Eleventh Circuit's en banc decision in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), cert. denied, —— U.S. —— (Oct. 3, 1983).

K. In this section of the petition Aldrich raises six separate challenges to the constitutionality of the Florida death penalty statute, Fla. Stat. Ann. § 921.141, as applied to his case. After careful review of the entire record the Court concludes that the first and third

through sixth challenges must be denied. The instructions given to the jury were free of constitutional error, and to the extent that Petitioner challenges the trial court's failure to instruct the jury that nonstatutory factors could be considered in their sentencing recommendation, the claim is barred by the cause and prejudice test of Wainwright v. Sykes. See Adams v. Wainwright, 709 F.2d 1443, 1448-49 (11th Cir. 1983).

The Court reserves ruling at this time on the second enumerated challenge in section K of the petition, that the death penalty is imposed in this state in an arbitrary, capricious and irrational manner, based upon racial, geographic, economic and other factors precluded from consideration by the death penalty statute and the United States Constitution.

In accordance with the foregoing and upon consideration of the entire record in this cause, it is,

ORDERED and ADJUDGED that the Petition for Writ of Habeas Corpus be, and the same is, hereby DENIED with respect to claims A through J, as well as claims K(1), (3),(4),(5) and (6).

The Court reserves ruling with respect to claim K(2).

The stay of execution entered by this Court's Order of June 20, 1983 shall remain in full force and effect pending further Order of this Court.

DONE and ORDERED at Miami, Southern District of Florida, this 2nd day of ~~November~~ Dec., 1983.

Jos Eaton
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-8315-Civ-JE

LEVIS LEON ALDRICH,
Petitioner,
vs.
LOUIE L. WAINWRIGHT, etc.,
Respondent.

ORDER OF DISMISSAL AND CERTIFICATE OF PROBABLE CAUSE

By Order dated December 2, 1983 this Court denied all claims raised by Petitioner in his Petition for Writ of Habeas Corpus, with the exception of Claim 18(K)(2), upon which the Court reserved ruling. Claim 18(K)(2) of the Petition alleges that the death penalty in Florida is arbitrarily and discriminatorily imposed on the basis of race of the victim, race of the defendant, and other impermissible factors.

Since entering its Order reserving ruling on the sole remaining claim, the Court has received into evidence the statistical studies on which it rests, and has held the claim in abeyance pending the en banc ruling of the Eleventh Circuit in Spencer v. Zant, 715 F.2d 1562, vacated for rehearing en banc, 715 F.2d 1583 (11th Cir. 1983). Also since that time four death-sentenced habeas petitioners relying on the identical or similar statistical studies as those presented here have raised this issue at the Court of Appeals and the Supreme Court. See (chronologically), Stephens v. Kemp, 722 F.2d 627 (11th Cir. Dec. 12, 1983)(denying petition

for rehearing en banc, six judges dissenting); Stephens v. Kemp, ___U.S.___, 78 L.Ed.2d 370 (Dec. 13, 1983)(granting stay of execution pending Spencer en banc ruling); Smith v. Kemp, ___U.S.___, 104 S.Ct. 565 (Dec. 14, 1983)(denying petition for rehearing from denial of certiorari); Adams v. Wainwright, No. 84-5322, slip. op. (11th Cir. May 8, 1984)(granting stay pending en banc consideration of Spencer, one judge dissenting), vacated without opinion, 52 U.S.L.W. 3820 (May 9, 1984); Ford v. Wainwright, No. 84-5372, slip op., (11th Cir. May 30, 1984)(alternatively granting stay pending en banc consideration of Spencer, one judge dissenting), aff'd on other grounds, ___U.S.___ (May 31, 1984). See also, Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983), application for stay of execution denied, ___U.S.___, 78 L.Ed.2d 210 (Nov. 29, 1983).

While the light reflected on the issue by this series of cases is diffuse, the most recent case has apparently foreclosed further consideration of the claim by this Court.

In Part II of his concurring opinion in Adams, supra, joined by Justices White and Blackmun, Justice Powell cited the action of the Supreme Court in Sullivan and Adams, supra, and wrote:

> Finally, we have held in two prior cases that the statistical evidence relied upon by Ford to support his claim of discrimination was not sufficient to raise a substantial ground upon which relief might be granted.

Wainwright v. Ford, No. A-980, slip op. (May 31, 1984). Three of the remaining justices, Chief Justice Burger, Justice Rehnquist and Justice O'Connor, voted to grant the

State of Florida's application to vacate the stay of execution. In view of the Supreme Court's treatment of the issue presented in claim 18(K)(2) in the series of recent cases cited above, it must be concluded that at least six Justices share Justice Powell's opinion that the statistical showing made here does not present a cognizable claim for relief. See Stephens v. Kemp, 78 L.Ed.2d 370, 375 (1983)(Powell, J., joined by Burger, C.J., Rehnquist, J. and O'Connor, J., dissenting).

In accordance with the foregoing, it is,

ORDERED and ADJUDGED that claim 18(K)(2) of the Petition be, and the same is, hereby DENIED for failure to state a claim upon which relief may be granted.

It is, therefore, FURTHER ORDERED that the Petition, in its entirety be, and the same is, hereby DISMISSED, and the stay of execution of Petitioner's sentence of death be, and hereby is, VACATED.

In accordance with Fed. R. App. P. 22, a Certificate of Probable Cause to Appeal the Court's disposition of this cause is hereby issued.

DONE and ORDERED at Miami, Southern District of Florida, this 7th day of June, 1984.

Jon Eaton
United States District Judge

cc: counsel of record

ORIGINAL

NO. 85-6956

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

LEVIS LEON ALDRICH,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JIM SMITH
Attorney General
Tallahassee, FL 32301

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent

QUESTIONS PRESENTED

I.

WHETHER THE ELEVENTH CIRCUIT CORRECTLY APPLIED THE STANDARDS OF STRICKLAND v. WASHINGTON, ___ U.S. ___, 80 L.ED.2D 674 (1984), IN REJECTING THE PETITIONER'S CLAIM OF INEFFECTIVE COUNSEL?

II.

WHETHER THE STATE AND FEDERAL COURTS HAVE CORRECTLY FOUND THAT PROCEDURAL DEFAULT BARS THE PETITIONER'S CLAIM REGARDING THE SENTENCER'S ALLEGED FAILURE TO CONSIDER A NON-STATUTORY MITIGATING CIRCUMSTANCE?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 85-6956

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

LEVIS LEON ALDRICH,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

OPINIONS BELOW

The Petitioner has accurately cited the opinions below.

JURISDICTION

The Respondent accepts the Petitioner's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Petitioner's citation to the Sixth and Fourteenth Amendments, the Eighth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

A. Preliminary Statement

The Petitioner was the Petitioner-Appellant in the Eleventh Circuit Court of Appeals and the Petitioner

in a habeas corpus proceeding brought pursuant to 28 U.S.C. §2254 in the United States District Court for the Southern District of Florida. In this pleading, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"RA"	The Record on Appeal in the Eleventh Circuit;
"R"	The Record on Appeal in the Florida Supreme Court on direct appeal;
"T"	Transcript of the state trial and sentencing;
"RH"	Record on Appeal to the Florida Supreme Court from the denial of post-conviction relief; and
"TH"	Transcript of the state post-conviction hearing

B. History of the Case

The Respondent accepts the Petitioner's statement regarding the course of the prior proceedings found at pages 2-3 of the petition as generally accurate. Respondent would add that the Eleventh Circuit panel divided only on the ineffective counsel claim. The dissenting judge did not comment on the issue regarding the sentencer's alleged failure to consider a non-statutory mitigating factor.

C. Statement of the Facts

1. The Evidence at Trial

The Petitioner was charged by an indictment filed October 17, 1974, with the capital crime of first degree murder (R 1). His trial commenced on January 6, 1975. The State, through direct and circumstantial evidence, proved the Petitioner personally killed the victim, Robert Ward, in the course of a robbery.

The first witness to testify was Lynn Ward,

the victim's widow (T 218). She testified her husband called her at 12:05 a.m. on September 3, 1974, to let her know he was leaving DiVagno's restaurant, where he worked (T 219). Deputy William Boyd was dispatched to DiVagno's restaurant to respond to a burglar alarm at 12:14 a.m. (T 223), and he arrived at 12:19 a.m. (T 224). The victim's body was lying outside the restaurant (T 231). Three spent shotgun shells were recovered near the body (T 271).

Joyce Marshall, a security guard, testified at about 1:00 a.m. on September 3 she saw a car pull off from Central Trucking (T 280). The car, a white Chrysler (T 284), headed towards her (T 281). She pulled out her gun and when the driver, who appeared to be the Petitioner, saw it, he took off (T 282, 283).

Deputy Walters stopped a white Chrysler driven by the Petitioner at about 2:00 a.m. due to the fact that it drove slowly by the restaurant where the crime had occurred (T 291, 294). The Petitioner had between five and six hundred dollars, including a lot of one dollar bills, stuffed into his four pockets (T 295). The Petitioner said he had just gotten out of prison and he had a Department of Corrections receipt for $558.58 (T 299). He also had a receipt showing he had paid $200 for his car (T 300).

Al DiVagno, the owner of the restaurant, testified he opened its door to let the police in (T 306). The lights were on in the kitchen, the office door was open, and the carpet was pulled back, exposing the empty, open safe (T 307). No one other than DiVagno and the victim knew the combination (T 307). Between six and nine hundred dollars had been taken, based on the fact that fifty-eight dinners had been served that evening (T 309, 321). The burglar alarm to the office door was set, but not to the back door (T 312). Mr. DiVagno knew the Petitioner, who had worked for him at the restaurant as a dishwasher earlier in 1974 (T 315).

He had been fired for exceeding his authority (T 317).

James Sapp was the Petitioner's roommate in prison, and knew the Petitioner was working at DiVagno's restaurant while he was in work release (T 332-333). The Petitioner told Sapp he planned to rob the place; he had set the burglar alarm once to see how long it would take the police to get there and it took fifteen minutes (T 335).

Charles Strickland also met the Petitioner in prison. They had both been released, and on September 2 the Petitioner called and asked Strickland if he could borrow a gun to go deer hunting (T 344-345). Strickland agreed, and he met the Petitioner at a parking lot and lent him a gun and five shells (T 347-348). Later that evening, Strickland drove someone to the hospital during the hours of midnight to 1:00 a.m. (T 351-352). At 1:30 a.m., after he had returned home, Strickland got a telephone call from the Petitioner, who said he had had to kill a man (T 352). The following day, the Petitioner called Strickland again and asked him to help him recover the gun from Central Truck Lines (T 353, 355). The Petitioner told Strickland he killed a man at DiVagno's restaurant because the man had tried to pull off his mask (T 355). Strickland disposed of the gun (T 357) but subsequently he showed the police where it was (T 374).

Anita Sapp and Jewel Sapp, two girls who lived in the house where Strickland was staying, testified they saw Strickland give his gun to a man on September 2 (T 393-394; 400-402). Jewel Sapp testified Strickland told them the man was Aldrich (T 404).

Lillie King testified Charles Strickland drove her to the hospital at 11:50 p.m. on September 2 and dropped her off at 12:40 a.m. on September 3 (T 409).

Richard Turnipseed, a job placement officer for the Department of Corrections work release program,

testified the Petitioner was paroled on August 26, 1974 (T 422). He received a check for $558.58 on August 27 (T 424). George Osborne, a car salesman, testified the Petitioner purchased a 1963 Chrysler on August 27 for $200 (T 442).

William Rathman, a firearms examiner, testified the shotgun submitted to him for testing had fired the three shells recovered from the crime scene (T 482). This shotgun was found on September 9, 1974, in a canal; Charles Strickland took the police to it (T 490).

Annie Mae Edwards, a cook at DiVagno's restaurant, testified she had worked with the Petitioner (T 501). He told her when he got out of prison he was going to rob the restaurant (T 504).

It was stipulated by the State and defense that the victim, Robert Ward, named in the indictment, was dead as the result of gunshot wounds (T 508).

After the State rested (T 512), the Petitioner testified and claimed an alibi. He asserted that on September 2 he went fishing until about 10:30 or 11:00 p.m. (T 517). He then went to Jo Ann's quarter bar until 1:30 or 2:00 a.m. (T 518). When he was stopped by the police, he was on his way to visit his landlady (T 519).

The jury returned a verdict finding the Petitioner guilty as charged (T 725-726).

2. The Evidence at the Post-Conviction Relief Hearing

In December, 1981, the state trial court held an evidentiary hearing on the Petitioner's claim of ineffective counsel.

Willie Gary, an attorney who was admitted to the Florida Bar on December 20, 1974, testified he began working for the Public Defender's Office as an intern in September, 1974 (TH 110). He was assigned to assist the

Public Defender, Elton Schwartz, with the Petitioner's case (TH 112-113). Mr. Gary worked with the office's investigator, Mr. Coppick, in preparing the case (TH 113, 115). Although depositions were not taken, the prosecutor had furnished statements from the State's witnesses (TH 117-118). At trial, the decision was made not to call defense witnesses in order to have opening and closing argument (TH 123). Mr. Gary stated he could not recall any of the State's evidence having caught the defense by surprise (TH 144).

Elton Schwartz, the Public Defender, testified the decision was made not to put on alibi witnesses because they were not exact enough, so it was preferable to preserve the right to give the closing argument (TH 183). The only surprise at trial occurred during the penalty phase during Sergeant Boyd's testimony concerning Jo Ann DeSamarais (TH 198). Mr. Schwartz was unable to give any specific examples as to how taking depositions would have affected the outcome (TH 200). Although it was a circumstantial evidence case, "there were too many circumstances there" (TH 226).

REASONS FOR DENYING THE WRIT

I.

THE COURT BELOW CORRECTLY APPLIED THE STANDARDS OF STRICKLAND v. WASHINGTON, ___ U.S. ___, 80 L.ED.2D 674 (1984), IN REJECTING THE PETITIONER'S CLAIM OF INEFFECTIVE COUNSEL.

The Petitioner asserts the Eleventh Circuit incorrectly applied the prejudice component of Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674 (1984), by requiring proof of affirmative evidence of innocence. On the contrary, the court correctly used the Strickland analysis, and concluded there was no prejudice sufficient

to undermine confidence in the outcome. The court merely pointed out that the Petitioner has never shown what more could have been done that would have affected the result of his trial. This is not tantamount to requiring evidence of innocence.

The basis of the Petitioner's claim is his counsel lacked time to investigate and depose witnesses because the court denied his motion for a continuance. In Morris v. Slappy, 461 U.S. 1 (1983), this Court held that not every restriction on counsel's time or opportunity to investigate, consult with his client, or otherwise prepare for trial violates a defendant's Sixth Amendment right to counsel. In the instant case, although the State's witnesses were not deposed, the Petitioner's case was investigated prior to trial. The State, in opposing the defense motion for continuance, noted it had furnished sworn statements of the material witnesses to the Public Defender in October, 1974, and the prosecutor had reviewed the evidence with the Public Defender's chief investigator (R 35-37). Willie Gary, a legal intern who had assisted the Public Defender in the preparation and trial, testified at the Petitioner's 1981 post-conviction evidentiary hearing that he worked in conjunction with the Public Defender's investigator, Mr. Coppick (TH 113-115). They had been furnished by the prosecutor with statements of the witnesses (TH 118), and Mr. Gary did not recall any of the State's evidence taking the defense by surprise at trial even though no depositions were taken (TH 144). A tactical decision was made not to call defense witnesses in order to have closing argument (TH 123).

Elton Schwartz, the Public Defender of the Nineteenth Judicial Circuit, testified the only surprise at trial was as to Sergeant Boyd's testimony during the penalty phase regarding a hearsay statement of Jo Ann

DeSamarais (TH 198). Mr. Schwartz was aware of what Ms. DeSamarais would testify, and decided not to call her because her testimony would not establish the Petitioner's alibi and he decided it would be preferable to preserve the right to closing argument (TH 183, 201, 211). Mr. Schwartz was unable to cite any specific instances to show that depositions would have affected the outcome (TH 200).

Thus, it is clear the Eleventh Circuit correctly held that this is not the type of case discussed in United States v. Cronic, ___ U.S. ___, 80 L.Ed.2d 657 (1984), where prejudice can be inferred. Rather, the ineffective counsel claim was properly addressed under the prejudice standard of Strickland v. Washington.

Although the Petitioner repeatedly asserts the State's case was weak, the Respondent must disagree. The evidence points unerringly to the Petitioner. As his lawyer stated in the post-conviction evidentiary hearing ". . . even though it was a circumstantial evidence case, there were too many circumstances there." (TH 226).

The evidence definitively established that the murder occurred between 12:05 a.m. and 12:14 a.m.: the victim's widow testified her husband called her from the restaurant at 12:05 (T 219) and Deputy Boyd was dispatched to respond to the restaurant's burglar alarm at 12:14 (T 223). The police were still at the scene around 2:00 a.m. when the Petitioner drove by slowly (R 291, 294). The Petitioner had between five and six hundred dollars in cash stuffed into all four of his pockets, including a lot of one dollar bills (T 295). The restaurant owner testified between six and nine hundred dollars was taken (T 309). The Petitioner told the police he had gotten the money when he was released from prison, and showed them a Department of Corrections receipt for $558.58 (T 299). He had spent $200 to buy a car (T 300, 442).

Al DiVagno, the owner of the restaurant, testified the Petitioner had been employed there as a dishwasher earlier in the year while on work release and was familiar with the operation (T 315-316). He had been fired for exceeding his authority (T 317). Annie Mae Edwards, a cook at the restaurant, testified the victim was friendly to the Petitioner while he was an employee and taught him about the business (T 502). The Petitioner told her when he got out of prison he would rob the restaurant and some other places around town; he would be able to keep the alarm from going off (T 503). James Sapp, who knew the Petitioner in prison, testified the Petitioner told him he planned to rob the restaurant (T 332-335).

Charles Strickland met the Petitioner in prison (T 342). After they were both released, Strickland testified the Petitioner called him around 7:00 p.m. on September 2 and asked to borrow his gun so he could go deer hunting (T 344-345). Strickland agreed, and he drove to the Fort Pierce hotel parking lot where he gave the Petitioner a gun and five shells (T 348). This part of Strickland's testimony was corroborated by Anita Sapp, age nine, and Jewel Sapp, age fourteen. Anita testified Strickland was staying at her house (T 393). She and Jewel rode along to the hotel with Strickland and saw him give the gun to a man, whom he said was his friend "Levi" (T 396). Jewel Sapp testified Strickland told them the man he gave the gun to was Aldridge (T 400, 404).

Strickland testified that after he gave the gun to Petitioner, he went home and went to bed (T 350). He was awakened later when a call came for another resident of the house, and she asked him to give her a ride to the hospital (T 351). This occurred around midnight, and he got back home at 1:00 a.m. (T 351-352). Lillie King corroborated the alibi; she testified Strickland woke her

at 11:50 p.m. because she had a call, and she then rode to the hospital with Strickland (T 407-408). They were at the hospital until about 12:30 a.m. and Strickland then drove them to a grocery parking lot to pick up her boyfriend's car (T 409).

Strickland testified the Petitioner called him about 1:30 a.m. and said he had had to kill a man (T 352). The following morning, the Petitioner called Strickland again and said they should go get the gun (T 353). They picked it up at Central Truck Lines (T 355). Joyce Marshall, a security guard, testified she saw a white Chrysler (the kind of car the Petitioner owned) pull off from Central Trucking at about 1:00 a.m. on September 3 (T 279-280). The Petitioner appeared to be the driver (T 283). The car headed right towards her, so she pulled out her gun, and the car took off (T 282). The Petitioner told Strickland he shot the victim three times because he had tried to pull off his mask (T 355, 383). In fact, three spent shotgun shells were recovered at the scene (T 271) within a ten-foot radius of the body (T 489). Strickland testified he disposed of the gun (T 357), but subsequently he showed the police where it was (T 374). It was recovered from a canal (T 490), and conclusively proved to be the murder weapon (T 482).

Therefore, the State's case was strong because Strickland's testimony, which directly implicated the Petitioner, was corroborated. According to Strickland, Petitioner said he shot the victim three times; three spent shells were recovered from the scene. Strickland said they recovered the gun from Central Trucking; Petitioner was seen there shortly after the time of the murder and when stopped by the police at 2:00 a.m., he did not have the shotgun in his possession. Strickland had a confirmed alibi for the time of the murder. By contrast, the defense

attorneys knew at the time of the trial that Petitioner's alibi could not be corroborated; Jo Ann DeSamarais had given them statements on September 30, 1974 and December 12, 1974, that the Petitioner was in her bar between 12:40 and 1:00 a.m. on September 3 (RH 244; 247). Since the murder occurred between 12:05 and 12:14, her testimony would not have corroborated the Petitioner's testimony that he was at her bar from 11:00 p.m. until 1:30 a.m. (T 517-518). Of course, the independent evidence that the Petitioner previously worked at the restaurant and was familiar with its operations, his prior statements that he planned to rob it,[1] and the large amount of money on his person shortly after the time of the murder[2] further confirms the Petitioner's guilt.

The Petitioner's attempt to show prejudice amounts to no more than speculation. Although in 1981, he was afforded a full and fair evidentiary hearing on the ineffectiveness claim, the Petitioner was unable to show any actual prejudice, and he has not to date. Not only the Eleventh Circuit, but every court which has considered the case has so found. The trial court entered an order which states:

> [Petitioner] has not shown that this specific deficiency of trial counsel's failure to take pretrial depositions upon oral examination of the State's main witnesses, when considered under the circumstances of this individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that this deficient conduct effected [sic] the outcome of the trial.

(RH 77). The Florida Supreme Court concluded:

---

[1]Even if the testimony of James Sapp, a fellow inmate, is set aside, the same information was testified to by Annie Mae Edwards, a cook at the restaurant.

[2]Although he had a D.O.C. receipt for $558.58, Petitioner had spent $200 on a car and been out of prison for several days so it is unlikely he would still have had $500-$600 remaining.

> In our view, the record clearly fails to 'demonstrate a prejudice to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings.' Appellant has made no attempt whatsoever to present any evidence to indicate what information would have been elicited in taking the depositions which would have affected the outcome of his trial.

Aldridge v. State, supra, 425 So.2d at 1136. The district court held:

> . . . Aldrich has failed to meet his burden on the second prong of the Sixth Amendment test, namely that counsel's representation at trial, even if ineffective, 'created not only a possibility of prejudice, but that it worked to his actual and substantial disadvantage' [citations omitted]. Because the court is not convinced that Aldrich's situation at trial would have been materially improved had counsel taken those steps that Petitioner asserts should have been taken, the petition must be denied on this ground.

(RA 597-598).

The issue before the court below was whether there is a reasonable probability the fact-finder would have had a reasonable doubt respecting guilt, absent counsel's purported errors, and in view of the totality of the evidence. Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674, 698 (1984). The Petitioner's assertion that United States v. Bagley, ___ U.S. ___, 87 L.Ed.2d 481 (1985), should somehow control this claim, is incorrect, for in Bagley the court adopted the Strickland formulation to be used for judging materiality under Brady v. Maryland, 373 U.S. 83 (1963), when the State has failed to disclose evidence favorable to an accused. In this case, Strickland is directly on point and pursuant to that decision, the Eleventh Circuit correctly determined that the Petitioner failed to show prejudice.

II.

THE STATE AND FEDERAL COURTS HAVE PROPERLY FOUND THAT PROCEDURAL DEFAULT BARS THE PETITIONER'S CLAIM REGARDING THE SENTENCER'S ALLEGED FAILURE TO CONSIDER A NON-STATUTORY MITIGATING CIRCUMSTANCE.

The Petitioner claims the purported non-statutory mitigating factor of "residual doubt" was not considered by the sentencer. This Court's decisions in Skipper v. South Carolina, ___ U.S. ___, 39 Cr.L. 3041 (1986) and Lockhart v. McCree, ___ U.S. ___, 39 Cr.L. 3085 (1986) do not compel the conclusion that residual doubt is an appropriate mitigating factor. Skipper v. South Carolina holds a defendant's disposition to make a peaceful adjustment to prison is an aspect of his character relevant to the sentencing process, so it is factually not on point. In Lockhart v. McCree, the majority opinion notes that not all states allow residual doubt to be argued at sentencing. The opinion in no way indicates that such a policy violates the Eighth Amendment.

If a case regarding this issue is taken for review by the court,[3] it should not be this one, for every court considering the matter has consistently found it to be barred by procedural default. The procedural default is an entirely independent and adequate ground, so certiorari is inappropriate.

The Eleventh Circuit succinctly outlined the procedural history of this issue in its opinion:

> Aldrich expressly requested at sentencing that no mitigating circumstances be presented to the jury, stating he preferred the death penalty to spending more time in prison. On direct appeal, the Florida Supreme Court stated 'the trial court found no mitigating

---

[3] In that regard, certiorari has been denied in Florida cases. Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982); Burr v. State, 466 So.2d 1051 (Fla.), cert. denied, ___ U.S. ___, 88 L.Ed.2d 170 (1985); Heiney v. Florida, ___ U.S. ___, 83 L.Ed.2d 237 (1984).

> circumstances and Aldridge does not contest that finding on appeal' . . . When Aldrich attempted to raise the claim for the first time in his motion for post-conviction relief, the trial court denied relief on the basis that the grounds raised 'have already been presented or should have been presented on direct appeal.' The Florida Supreme Court affirmed the denial of relief [on this issue] . . . The district court correctly held that there was a procedural default under Wainwright v. Sykes [433 U.S. 72 (1977)].

Aldrich v. Wainwright, 777 F.2d 630, 638-639 (11th Cir. 1985).

Thus, the procedural default was correctly determined by the Eleventh Circuit to bar federal habeas corpus review on the merits, since no cause and prejudice was shown. Aldrich expressly made it clear to his attorney and to the trial court that he did not want to present anything in mitigation because he would prefer the death penalty to life in prison (TH 215-216; R 65). Accordingly, defense counsel stated to the jury:

> As I indicated, ladies and gentlemen, my client has not asked for me to plead for an advisory opinion for life imprisonment. Under the statute, as Mr. Stone has made out, on a capital offense such as this, a life sentence requires the serving of--a mandatory serving of a minimum of twenty-five calendar years before even being eligible for parole. Mr. Aldridge has spent ten years in the state prison. He has no desire to spend the rest of his life there. He has, therefore, asked me and I will accede to his wishes and not request that there be mitigating circumstances presented.

(T 746).

After the jury returned its recommendation of death, and prior to the imposition of sentence, the Petitioner and his attorneys advised the judge they had nothing to say on the Petitioner's behalf (T 755). There was never any attempt on the Petitioner's part to argue that a non-mitigating factor of residual doubt existed. This issue was never raised until the filing of the

Petitioner's motion for post-conviction relief in November, 1979, almost five years after the trial. Therefore, the Eleventh Circuit correctly concluded that consideration of the Petitioner's claim was foreclosed, and there was no cause to excuse the default, pursuant to the controlling authority of Wainwright v. Sykes, supra. See also, Engle v. Issac, 456 U.S. 107 (1982); United States v. Frady, 456 U.S. 152 (1982); Reed v. Ross, ___ U.S. ___, 82 L.Ed.2d 1 (1984). The petition for certiorari thus does not meet any of the considerations governing review enumerated in Rule 17 of the Supreme Court Rules (1980), and it should be denied.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities cited therein, the Respondent requests that the petition for certiorari be denied.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, FL 32301

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Respondent

NO. 85-6956

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

LEVIS LEON ALDRICH,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

CERTIFICATE OF SERVICE

I, Joy B. Shearer, hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have served copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari in the above case to counsel for Petitioner, by depositing same in the United States Mail, first-class postage prepaid, addressed as follows:

Craig S. Barnard, Esquire
Chief Assistant Public Defender
Office of the Public Defender
224 Datura Street, 13th Floor
West Palm Beach, FL 33401

All parties required to be served have been served. Done this 18th day of June, 1986.

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

ORIGINAL

No. 85-6956

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

LEVIS LEON ALDRICH,

Petitioner,

-v-

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, LEVIS LEON ALDRICH, pursuant to the authority of Rule 22.6, Rules of the Supreme Court of the United States, files his supplemental brief to call attention to an intervening case not available at the time of filing his petition for writ of certiorari in the above-styled cause.

DISCUSSION

On June 9, 1986, the Court granted the petition for writ of certiorari in Hitchcock v. Wainwright (No. 85-6756). ___U.S.___, 106 S.Ct. 2888. One of the two questions presented in Hitchcock is concerned with the same constitutional issue that underlies Question 3 in Mr. Aldrich's petition. That issue is the interpretation and application of the Florida capital sentencing statute by the Florida Supreme Court prior to the Court's opinion in Lockett v. Ohio, 438 U.S. 586 (1978), to preclude the consideration of nonstatutory mitigating circumstances in the determination of the sentence in a capital trial. Mr. Hitchcock has argued that due to this interpretation and application of the statute, the Florida statute was unconstitutional prior to Lockett. See Brief for Petitioner, Hitchcock v. Wainwright (No. 85-6756), at 14-20. Mr. Aldrich was sentenced during the pre-Lockett period, on January 8, 1975. Further, Mr. Hitchcock has

argued that the pre-Lockett interpretation of the Florida statute had actual and specific consequences in his case that precluded the consideration of nonstatutory mitigating circumstances. Id. at 20-35. Mr. Aldrich has presented the same kind of argument in his petition, by showing that his decision not to argue residual doubt about guilt as a basis for a life sentence -- as well as the judge's failure to consider this factor in sentencing him -- were due to his, his lawyers, the prosecutor's, and the judge's common understanding that nonstatutory factors such as this could not be considered in sentencing.

CONCLUSION

For these reasons, the Lockett question presented by Mr. Aldrich is manifestly worthy of review by the Court. Certiorari should accordingly be granted, not only to consider the important question of prejudice associated with counsel's ineffective assistance in the guilt-innocence phase of Mr. Aldrich's trial, but also to consider the Lockett error that is already under review in Hitchcock v. Wainwright.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Strreet/13th Floor
West Palm Beach, Florida 33401
(305) 837-2100

CRAIG S. BARNARD
Chief Assistant Public Defender

RICHARD H. BURR III
Assistant Public Defender

BY _____
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joy B. Shearer, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by mail this 12th day of September 1986.

_____
Of Counsel

SUPREME COURT OF THE UNITED STATES

LEVIS LEON ALDRICH *v.* LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-6956. Decided October 20, 1986

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Court of Appeals for the Eleventh Circuit insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). However, even if I believed that the death penalty could be imposed constitutionally under certain circumstances, I nevertheless would grant certiorari because petitioner was denied effective assistance of counsel at his trial in violation of the Sixth and Fourteenth Amendments.

I

Petitioner Levis Leon Aldrich was charged with the murder of Robert Ward, the night manager at a restaurant where Aldrich had at one time been employed. Ward's body was discovered at 12:25 a. m. on September 3, 1974, by sheriff's deputies responding to the restaurant's burglar alarm. Ward had been shot in the head. The restaurant's safe had been emptied of the evening's receipts, estimated by the owner at between $600 and $900. At roughly 2 a. m., police stopped petitioner, who was driving his car slowly by the restaurant. Petitioner was carrying more than $500 in cash. At their request, petitioner took the police officers to the hotel room in which he had been staying since his release from

prison the week before. There he showed the officers his receipt for $558.58 paid to him by the Department of Corrections at the time of his release.

The shotgun which had killed Ward was later discovered by the police, broken apart, in two ditches in the surrounding neighborhood. No physical evidence at the crime scene or on the shotgun linked petitioner to the killing. However, after further investigation, petitioner was arrested and indicted.

Aldrich was represented by appointed counsel from the Public Defender's office. The only member of that office who conducted any investigation or undertook any preparation for the trial until two weeks before the trial date was a legal intern in the office, who during the relevant period was not yet a member of the bar. Trial counsel did not exercise the right, under Florida law, to depose any of the State's forty-one prospective witnesses. No one from the Public Defender's office examined any of the State's physical exhibits. Of the seven prospective witnesses identified by the defense before trial, petitioner's counsel had interviewed only two. Pet. for Cert. 12.

Four days before the opening of trial, petitioner's counsel moved for a continuance. The motion was heard on the scheduled trial date, at which time defense counsel told the court that "[t]his case is not prepared. We are not in a position to provide competent legal representation." *Id.*, at 11. The trial court denied the motion and insisted that the trial begin immediately. Petitioner's trial counsel, who was fully experienced in the trial of capital cases, testified in the state post-conviction hearing that he had never been as unprepared to try even a misdemeanor case as he was for petitioner's capital murder trial. *Ibid.*

The State's case hinged upon the testimony of Charles Strickland. Strickland owned the shotgun which had killed Ward; he told police that he had lent it to petitioner on the evening of the murder. Strickland claimed that petitioner called him the next day, and told him that he had used the gun in a robbery and had killed a man. According to Strickland, petitioner asked him to help recover the gun from a parking lot near the scene of the murder. Strickland testified that he did so, after which he cleaned the gun, broke it down, and threw the parts into separate ditches. Although Strickland initially told police that he had lost the gun, he later changed his mind and led police to the evidence. James Norman Sapp, who along with Strickland had met petitioner in prison, testified that while in prison petitioner had told Sapp that he intended to rob the restaurant when released.

The sole defense witness was petitioner himself, who denied any involvement in the crime. He testified that he had been fishing until 10:30 or 11 p. m. on the night of the murder, and had then gone to a bar until 1:30 or 2 a. m. After leaving the bar, petitioner testified, he drove out to meet a woman who had a room to rent. On the way to her house, he passed the restaurant, and was stopped by the police.

The jury found petitioner guilty of capital murder. At petitioner's express request, counsel presented no evidence in mitigation of sentence. The jury returned an advisory verdict in favor of the death sentence, which the trial court then imposed. The Florida Supreme Court affirmed petitioner's conviction and death sentence. *Aldridge* v. *State*, 351 So. 2d 942 (1977).* Post-conviction relief was denied. *Aldridge* v. *State*, 425 So. 2d 1132 (1982), cert. denied, 461 U. S. 939 (1983). In his first federal habeas petition, Aldrich claimed that he had been denied effective assistance of counsel at his trial. The District Court denied relief, and the Court of Appeals affirmed. 777 F. 2d 630 (CA11 1985).

II

The District Court found, and the Court of Appeals agreed, that petitioner's trial counsel was so handicapped by

*Petitioner's last name was apparently misspelled as "Aldridge" in the

absence of preparation that he could not meet the objective standard of reasonably effective assistance of counsel required by this Court in *Strickland* v. *Washington*, 466 U. S. 668 (1984). The Court of Appeals held, however, that petitioner had failed to show that he was prejudiced by the inadequacy of his counsel, as required by *Strickland*, *supra*. The Court of Appeals found that further investigation before trial would not have disclosed helpful evidence: "On cross-examination at the post-conviction hearing, [counsel] who represented Aldrich at trial were unable to point to any fact learned at trial, or later, that might have been discovered by deposition." 777 F. 2d, at 637. In response to the statement of counsel that investigation would have shown that Strickland and Sapp had a motive to commit the robbery, and additionally had reasons to throw suspicion on petitioner, the Court of Appeals found this "insufficient to [create] 'a reasonable probability' of reasonable doubt respecting guilt." *Id.*, at 636.

III

I continue to believe that "a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby." *Strickland*, *supra*, at 712 (MARSHALL, J., dissenting). Even under the prejudice standard, however, the facts disclosed by the record demonstrate that petitioner is entitled to relief. As the Court recognized in fashioning the prejudice standard, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.*, at 696. The dissent in the Court of Appeals correctly characterized this case:

> "Petitioner was convicted on the basis of evidence that was far from strong. No physical evidence implicating Aldrich was recovered at the scene of the killing. While

---

state-court proceedings.

> in custody, Aldrich made no statements resembling a confession. The only direct evidence implicating Aldrich was testimony from a convicted felon who had violated the terms of his parole and lied to police investigators, and who was the other most likely suspect in the crime." 777 F. 2d, at 642 (Johnson, J., dissenting).

Petitioner's life rested on the outcome of the jury's estimation of the relative credibility of petitioner and Charles Strickland. Yet because of the absence of preparation time, petitioner's counsel had not interviewed the witnesses whose testimony might bear on the credibility of Strickland's story. Even more importantly, counsel had not exercised his state-law right to take Strickland's deposition. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, *supra*, at 686. In a case as closely balanced as this one, I believe we can have no confidence in the result where counsel's inadequate preparation precluded the vigorous testing of the evidence upon which the State proposed to forfeit a man's life.

I would grant the petition for certiorari.